No. 84-335

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In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
Appendix A (Opinion dated 3/8/84)	1a
Appendix B (Opinion Sur Grant Stay and Order dated 1/20/83)	31a
Appendix C (Memorandum and Order dated 12/3/82)	44a
Appendix D (Memorandum and Order dated 11/12/82)	78a
Appendix E (Judgment dated 3/8/84)	79a
Appendix F (Denial of Rehearing dated 4/13/84)	81a
Appendix G (Opinion dated 5/22/79)	83a
Appendix H (Memorandum dated 2/14/78)	117a
Appendix I (Opinion and Order dated 8/23/84 *Burkhart* v. *Saxbe)*	143a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1812

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, individually and as Attorney General of the United States, L. Patrick Gray, 3rd, individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE, ALBERT COOPER and DAVID PORTER

John N. Mitchell, Albert Cooper, and David Porter,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT OCURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Civil No. 72-1920)

No. 83-3150

KEITH FORSYTH,

Plaintiff-Respondent

HON. RAYMOND J. BRODERICK,
United States District Judge

Nominal Respondent

v.

RICHARD G. KLEINDIENST, et al.,
Defendants

JOHN N. MITCHELL,
Defendant-Petitioner

PETITION FOR A WRIT OF MANDAMUS

Argued September 13, 1983
Before WEIS, HIGGINBOTHAM and
SLOVITER, *Circuit Judges.*
(Filed March 8, 1984)

OPINION OF THE COURT

HIGGINBOTHAM, A. LEON, JR., *Circuit Judge*.

This case involves former Attorney General John N. Mitchell's second interlocutory appeal from a denial of both absolute and qualified immunity for his authorization of unconstitutional FBI electronic surveillances of Keith Forsyth's telephone conversations with William Davidon. *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979) ("*Forsyth I*"), *cert. denied*, 453 U.S. 913 (1981), *reh. denied* 453 U.S. 928 (1981). We remanded the first interlocutory appeal directing the district court to decide a narrow factual question in the context of the absolute immunity test we enunciated in *Forsyth I*. However, we declined to consider the qualified immunity defense in *Forsyth I* because it was a non-appealable interlocutory order. On remand, the district court denied defendant Mitchell both absolute and qualified immunity.

Mitchell's appeal does not assert that the district court erred in the factual finding on remand or erred in its application of the *Forsyth I* test to that factual finding. Instead, he argues that two recent Supreme Court decisions, *Nixon v. Fitzgerald*, 102 S.Ct. 2690 (1982) ("*Nixon*") and *Harlow & Butterfield v. Fitzgerald*, 102 S.Ct. 2727 (1982) ("*Harlow*"), which were decided after *Forsyth I*, but before the district court's disposition of this case on remand, control this case and mandate the application of a test different from that enunciated in *Forsyth I*. Moreover, Mitchell argues that *Harlow* allows us to consider anew whether the interlocutory order denying qualified immunity may be appealed. Finally, Mitchell seeks a Writ of Mandamus on the issue of qualified immunity.

We hold that *Forsyth I*, as the law of the case, continues to control our disposition of this case. In our view, *Nixon* and *Harlow* simply do not demand an approach or result different from that directed by us in *Forsyth I* and followed by the district court on remand. Accordingly, we affirm the district court's denial of absolute immunity and dismiss, as non-appealable, Mitchell's interlocutory appeal of the district court's denial of qualified immunity. Finally, we deny petitioner Mitchell's request for a Writ of Mandamus.

I.

Keith Forsyth ("Plaintiff/Appellee") initiated this action in September, 1972 claiming that former Attorney General John N. Mitchell ("Defendant/Appellant")[1] violated his rights under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 and the First, Fourth, Sixth and Ninth Amendments to the Constitution. The alleged violation stemmed from Mitchell's authorization of a warrantless electronic surveillance in which Forsyth's telephone conversations with William Davidon, a professor at Haverford College and allegedly a member of an organization under investigation, were overheard. Following discovery, the district court denied cross-motions for summary judgment. *Forsyth v. Kleindienst*, 447 F.Supp. 192 (E.D. Pa. 1978). The court also rejected Mitchell's

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1. Former Attorney General Richard G. Kleindienst and former Acting Director of the Federal Bureau of Investigation ("FBI"), L. Patrick Gray, 3rd, were also named originally as defendants. Plaintiff subsequently admitted that the complaints against them should be dismissed, and the appropriate court order was later entered. Two FBI employees, E. David Porter and Albert Cooper, also had been named defendants in an amendment to Forsyth's original complaint, but they too were dismissed.

claims of absolute immunity and qualified immunity. *Id.* at 198-99, 201.

Mitchell filed a motion for reconsideration and, alternatively, sought certification of the district court's opinion for interlocutory appeal under 28 U.S.C. § 1292(b); he was unsuccessful in both attempts. A notice of appeal was subsequently filed whereupon plaintiff moved to dismiss the appeal because it was interlocutory. This court held that "the denial of defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) collateral order doctrine," but dismissed the defendant's interlocutory appeal from the denial of qualified immunity. *Forsyth I*, 599 F.2d at 1208 (citation added).

On the merits of the appeal in *Forsyth I*, this court rejected Mitchell's argument that "[a]s the head of an executive agency, the Department of Justice, . . . he should not be held liable for what he characterizes as an error in judgment." *Id.* at 1209, 1209-10. We analyzed his absolute immunity claims primarily in the context of *Butz v. Economou*, 438 U.S. 478 (1978) ("*Butz*") and *Imbler v. Pachtman*, 424 U.S. 409 (1976) ("*Imbler*"). We interpreted *Butz* and *Imbler* as providing the shield of absolute immunity only in situations where an official charged with a constitutional violation is engaged in adjudicative or prosecutive functions. Thus, in *Forsyth I*, we held as follows:

> Our reading of *Butz* and *Imbler* leads us to the conclusion that the Attorney General's decision to authorize the warrantless electronic surveillances is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function; however, when the decision arises in the context of a purely investigative or administrative

> function, the decision will not be protected by absolute immunity.

Forsyth I, 559 F.2d at 1215.

Accordingly, the case was remanded to the district court to decide the narrow question of whether Mitchell's authorization of the wiretap was closely connected with the judicial process and whether the wiretap was necessary to initiate a criminal prosecution.

On that issue, a hearing was held, but Mitchell failed to present any evidence which would support a quasi-judicial purpose for the surveillance. Indeed, the district court stressed that

> [p]rior to the hearing of January 8, 1982, the government filed a memorandum of law, an affidavit, and several accompanying exhibits. At no time, however, did the government present any evidence, documentary, testimonial, or otherwise, suggesting that defendant Mitchell meant anything other than what was said in his deposition.

Forsyth v. Kleindienst, 551 F.Supp. 1247, 1252 (1982).

During his deposition testimony Mitchell revealed the following uncontested facts:

> [T]he Davidon wiretap had an *investigatory* purpose, i.e., to obtain more details about the suspected plot to destroy utility tunnels in Washington, D.C. and to kidnap National Security Council Chairman Henry Kissinger so that the Justice Department, acting through the FBI, might thwart these schemes.

Id. (emphasis added). Moreover, Mitchell admitted that he did not know whether a criminal proceeding had been initiated or whether a criminal investigation was pending regarding Davidon or the other alleged utility

tunnel and Kissinger plot members at the time he authorized the wiretaps. The crucial testimony on this issue is quoted below:

> Q. When you received this request [from FBI Director J. Edgar Hoover for authorization for the Davidon wiretap], did it occur to you that the information that could be obtained or would be obtained as a result of this tap could be used in a criminal prosecution?
>
> A. It was not the point of my focus in authorizing the electronic surveillance.
>
> Q. What was the point of your focus?
>
> A. *The gathering of information necessary to protect the national security and to get information on foreign intelligence.*

Volume II Appendix ("II. App.") at 106 (emphasis added); *see also* II. App. at 92-96, 104-06; 123-26; 154-55. Because Mitchell testified, without repudiation, that the wiretap was authorized for national security purposes, not for any prosecutorial quasi-judicial function, the district court took him at his word.

It concluded that "[t]he purpose of the wiretap was prevention -- not prosecution," *Forsyth v. Kleindienst*, 551 F.Supp. at 1252, and that "Attorney General Mitchell was not in any way weighing factors in order to determine whether and whom to prosecute." *Id.* Thus, applying the *Forsyth I* test, which combined the "special function" tests of *Butz* and *Imbler*, the district court held that absolute immunity does not shield Mitchell from liability in the present action. *Id.* at 1253.

The district court also ruled against Mitchell on the issue of qualified immunity. Relying on *Harlow*, 102 S.Ct. 2690 (1982), the district court granted

summmary judgment to the plaintiff because it believed that defendant Mitchell did not meet the test enunciated in *Harlow*. The district court reasoned that because Mitchell failed to establish an objective basis for believing his action to be lawful at the time he authorized the wiretaps in question, the clearly established law made his warrantless wiretapping an unconstitutional violation of plaintiff's rights. *Forsyth v. Kleindienst*, 551 F.Supp. at 1261.

Applying the *Forsyth I* test and the "special functions" approach of *Butz* and *Imbler*, the district court denied defendant Mitchell's claim for absolute immunity. It also denied him qualified immunity and granted plaintiff summary judgment on the issue of liability.

Although the case was set for trial on the issues of damages, the district court declined to certify its decision for interlocutory appeal and denied defendants' Motion for a Stay of Trial pending appeal. *Id.* at 1263-66; Vol. I Appendix ("I. App.") at 37-45. This court granted a stay, allowed the appeal on the absolute immunity issue, and referred the appealability of the qualified immunity issue to the merits panel. *Forsyth v. Kleindienst*, 700 F.2d 104-10 (1983). Mitchell also filed a Petition for Mandamus on the issue of qualified immunity. That petition, No. 83-3150, has been consolidated and referred to this panel for resolution.

II. Absolute Immunity

We will consider first whether the former Attorney General John N. Mitchell should be absolutely immune from civil liability for permitting the domestic electronic surveillance of Keith Forsyth's telephone conversations with William Davidon without prior judicial authorization. The denial of a claim of absolute immunity is an interlocutory order appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); however,

this is the second time that defendant Mitchell presents this issue to us on interlocutory appeal. The last time, in *Forsyth I*, we enunciated a test and directed the district court to apply that test in deciding whether Mitchell was performing a quasi-judicial function in authorizing the wiretap and therefore entitled to absolute immunity.

Following our directive, the district court correctly applied the test enunciated in *Forsyth I* in denying Mitchell absolute immunity. Mitchell argues now that two recent intervening decisions of the Supreme Court control and make the *Forsyth I* test inappropriate. Mitchell concludes that under *Nixon v. Fitzgerald*, 102 S.Ct. 2690 (1982) and *Harlow & Butterfield v. Fitzgerald*, 102 S.Ct. 2727 (1982) we must find him absolutely immune from civil liability. Mitchell concedes, however, that but for his interpretation in *Nixon* and *Harlow*, the district court's decision -- not having been based on a clearly erroneous finding of fact or misapplication of our directive in *Forsyth I* -- would have to be affirmed. Thus, we must decide whether the Supreme Court's recent decisions of *Nixon* and *Harlow* require us to modify our *Forsyth I* test and the result in this case.

Nixon expressly concerned the scope of the former President Richard Nixon's immunity. The finding of absolute immunity for Nixon turned on his former office as President. The Supreme Court held that the former President of the United States is protected by the doctrine of absolute immunity from damages arising from his official acts because of his unique and singular position in our constitutional system. *Nixon*, 102 S.Ct. at 2701. The pertinent language of its holding in *Nixon* is as follows:

> We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the

> separation of powers, and supported by our history.
>
> . . .
>
> The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity.
>
> . . .
>
> In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. E.g., *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895; *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed 2d 90. We find these cases to be inapposite. *The President's unique status under the Constitution distinguishes him from other executive officials.*
>
> *Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.*

Nixon, 102 S.Ct. at 2701-03 (emphasis added; footnotes omitted). *See also Harlow*, 102 S.Ct. at 2735.

In carving out a shield of absolute immunity for the former President, the Court continued to apply the standards enunciated in *Butz*, 438 U.S. at 478 and *Imbler*, 424 U.S. at 409. In *Nixon* the Court devoted

several pages of analysis to demonstrating how its holding there was in fact consistent with *Butz* and *Imbler*. The Court distinguished between the President and cabinet officers such as the Attorney General, declaring that the President's "unique status under the Constitution distinguishes him from other executive officials." *Nixon*, 102 S.Ct. at 2702. Consequently, we reject defendant Mitchell's assertion that *Nixon* controls this case and mandates a result different from that reached by the district court.

Having decided that *Nixon* fails to provide Mitchell with an escape from the law of the case and binding effect of *Forsyth I*, we turn to his reliance on *Harlow* for his claim of absolute immunity. Defendant Mitchell uses *Harlow* for support of a "special functions" analysis. In *Harlow*, the Court reiterated its prior recognition "that the judicial, prosecutorial, and legislative functions require absolute immunity." *Harlow*, 102 S.Ct. at 2735. Therefore, the Court declined to grant the undifferentiated extension of absolute immunity to a President's aides. Defendant concedes however in his Motion to Stay Trial pending appeal that a "special functions" argument already has been considered and "*sub silentio* rejected" by this court in *Forsyth I*. Defendant's Motion to Stay Trial at 9.

In *Forsyth I* we considered and interpreted the *Butz* "special functions" approach to provide absolute immunity to an Attorney General engaged in a quasi-judicial function. That approach was reaffirmed by the Supreme Court in *Nixon* and recognized with approval in *Harlow*. *See Harlow*, 102 S.Ct. 2733; *Nixon*, 102 S.Ct. 2700. As Judge Sloviter observed, "[t]he references in *Harlow* to the absolute immunity which might be accorded on the basis of 'special functions' make it clear that the Court did not announce any new law but merely reiterated what it

had previously said in *Butz v. Economou*." *Forsyth v. Kleindienst*, 700 F.2d at 104, 109 (Opinion Sur Grant of Stay) (Sloviter, J., dissenting). Thus, we reject Appellant's argument that *Harlow* requires a result different from that reached by the district court in its application of our *Forsyth I* test.

For these reasons we believe that the district court did not err in denying Mitchell's absolute immunity claim for the unwarranted electronic surveillance of Forsyth's telephone conversation with William Davidon.

III. Appealability of Summary Denial of Qualified Immunity

Defendant Mitchell appeals also the district court's summary denial of his qualified immunity claim. This interlocutory appeal was previously before us in *Forsyth I* and we found it non-appealable.[2] The Supreme Court denied certiorari, *Forsyth v. Kleindienst*, 453 U.S. 913 (1981), and denied rehearing, 453 U.S. 928 (1981) on *Forsyth I*. As stated earlier, *Forsyth I*, as the law of this court, binds us unless the Supreme Court has mandated otherwise.

Mitchell argues that, at the time of our *Forsyth I* opinion, the doctrine of qualified immunity did not protect a defendant from the burdens of trial, but only from liability. *Forsyth I*, 599 F.2d at 1209. Moreover, Mitchell asserts that *Harlow* has reformulated the qualified immunity doctrine mandating its appealability as a final order within 28 U.S.C. § 1291. Additionally, he relies on *McSurely v. McClellan*, 697

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2. The dissent stresses the fact that this is an old case and that the facts are not disputed; and therefore, we ought put this case to rest now. However, we cannot base the appealability of cases based on the length of time that the parties have been involved in litigation.

F.2d 309, 315-16 (D.C. Cir. 1982) (per curiam) as persuasive support for his argument.

While sharing the concern for protecting government officials from insubstantial claims, we adopt the view of Judge Sloviter "that concern over subjecting government officials to unwarranted claims is best handled through adjustment of the substantive rules of law, as the Supreme Court has recently done, and not by changing the established practice of limiting appellate review of interlocutory decisions." *Forsyth v. Kleindienst*, 700 F.2d at 110 (1983) (Opinion Sur Grant of Stay) (Sloviter, J., dissenting).

Qualified or "good faith" immunity is an affirmative defense which the particular official who seeks to rely on it must plead. The pre-*Harlow* qualified or "good faith" immunity contained both subjective and objective elements. "The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" *Harlow*, 102 S.Ct. at 2737, quoting *Wood v. Strickland*, 420 U.S. 308, 320 (1975). The Court in *Harlow* indicated that the subjective element referred to "permissive intentions" and it reasoned that "[t]he subjective element of the good faith defense frequently has proved incompatible with the [Supreme Court's] admonition in *Butz* [*v. Economou*, 438 U.S. 478)] that insubstantial claims should not proceed to trial." *Harlow*, 102 S.Ct. at 2737. Therefore, in *Harlow*, the Supreme Court dropped the subjective fact-oriented element of qualified immunity and reformulated the doctrine in terms of objective good faith.

Because of *Harlow* a summary judgment motion initiated by a defendant government official can now be granted despite a plaintiff's claim that the government official lacked subjective good faith in his challenged actions. Thus, a government official may avoid insubstantial claims that are based on claims alleging

the absence of subjective good faith. We interpret *Harlow* as encouraging the summary disposition of insubstantial claims brought against government officials, not as relaxing the rule limiting interlocutory appeals.

Moreover, we do not find Mitchell's reliance on *McSurely v. McClellan*, 697 F.2d 309 (D.C.Cir. 1982) (per curiam) persuasive support for allowing an interlocutory appeal of a denial of qualified immunity. *McSurely* holds that "appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity." *Id.* at 316. It emphasized that under *Harlow* "part of the purpose of immunity, whether absolute or qualified, is to shield government officials from 'the risks of trial --distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Id.*, *quoting Harlow v. Fitzgerald*, 102 S.Ct. at 2738. Thus, the *McSurely* court concluded that, under *Harlow*, the Supreme Court "consciously sought to facilitate summary disposition of insubstantial claims against government officials." *Id.*

In the case before us, however, we are without the insubstantial claims which concerned the *Harlow* and *McSurely* courts. The district court here did not defeat a defendant's motion for summary judgment simply because a plaintiff alleged a subjective lack of good faith on the part of a defendant. Instead, the district court relied on the new objective standard enunciated in *Harlow* and found defendant Mitchell liable on summary judgment. Therefore, *Harlow* and *McSurely* are distinguishable from this case.

At this juncture it is again appropriate to quote from Judge Sloviter's dissenting opinion from the

majority's decision to deny the motion to dismiss the appeal of this issue and instead refer consideration of it to the merits panel:

> The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. [We] fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss [would] open the sluices to a flood of interlocutory appeals crushing us even further under a weight of our own making.

Forsyth v. Kleindienst, 700 F.2d at 110. (Opinion Sur Grant of Stay)(Sloviter, J., dissenting).

We decline to subject our colleagues to unnecessary additional burdens by opening the sluice gates; thus, mindful of our binding precedent in *Forsyth I* and the large number of state, local, and federal officials that often rely on claims of immunity, we will dismiss defendant's challenge to the district court's denial of his claim to qualified immunity. We will also deny, for the same reasons, defendant's Petition for Writ of Mandamus.

IV.

Accordingly, we will affirm the district court's denial of absolute immunity, dismiss the appeal of the denial of qualified immunity, and deny the Petition for Writ of Mandamus.

WEIS, *Circuit Judge*, dissenting.

I am persuaded that in addition to absolute immunity, the issue of qualified immunity is properly before this court. Determining that the "clearly established" test has not been met, I would find that

defendant meets the requirements for qualified immunity and is entitled to judgment. Accordingly, I dissent.

I

In *Forsyth v. Kleindienst*, 599 F.2d 1203, 1208 (3d Cir. 1979) (*Forsyth I*), we concluded that denial of summary judgment based on the lack of absolute immunity was appealable under the collateral order doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). In the absolute immunity context, as happens when dismissal on double jeopardy grounds is denied, *Abney v. United States*, 431 U.S. 651 (1977), the right not to be subjected to trial is irretrievably lost if appellate review must await final adjudication on the merits. The order of the district court here, denying absolute immunity and directing that the matter proceed to trial, is final on that issue and is ripe for appellate review. I agree with the majority's ruling on this jurisdictional question because it is consistent with the Supreme Court's treatment of the appeals in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The present appeal raises the defendant's contention that the district court erred in denying not only absolute, but qualified immunity as well. In the earlier appeal, we concluded that the refusal of qualified immunity could not be reviewed on a theory of "tag along" or "pendent" appellate jurisdiction. In *Cohen*-type appeals only claims that fall within the collateral order exception will be entertained. *Abney*, 431 U.S. at 663. Therefore, an order denying qualified immunity must itself meet the jurisdictional requirements of 28 U.S.C. § 1291 (1976).

At the time *Forsyth I* was before us, the qualified immunity defense rested on factors not amenable to pre-trial resolution. *See Wood v. Strickland*, 420 U.S.

308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). We concluded therefore that the denial of summary judgment on that defense was not immediately appealable.

Three years after we decided *Forsyth I*, the Supreme Court reappraised and substantially revised the test for qualified immunity in *Harlow*. 457 U.S. at 815-20. Recognizing that its previous formulation often did not permit pre-trial termination of insubstantial law suits, the Court acknowledged that "an adjustment of the 'good faith' standard" was essential, *id.* at 815, and announced a new test. Under it "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

This objective standard now permits summary judgment for the official if the law was not "clearly established" at the time the challenged action occurred. But even if the right's existence had been settled, courts should grant qualified immunity if the defendant "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Id.* at 819.

In urging that insubstantial claims be determined before trial and even before discovery, the Court itemized costs borne not only by the defendant officials, but by society as well. "[T]he expenses of litigation, the diversion of official energy from pressing public issues,. . . the deterrence of able citizens from acceptance of public office," and the inhibition from "unflinching discharge" of duty were cited as consequences to be avoided. *Id.* at 814, 816-17. The Court also recognized the risks imposed on public officials who must defend their actions before a jury, emphasizing that "in times of political passions,

dishonest or vindictive motives are readily attributed . . . and [are] readily believed." *Id.* at 814 n.23, *quoting Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

In short, avoiding trial through prompt disposition of insubstantial claims by summary judgment is as compelling an objective in cases properly invoking qualified immunity as in those where absolute immunity is available. The *Harlow* Court strongly urged early resolution of non-meritorious law suits that "undermine the effectiveness of government." 457 U.S. at 800-01 n.35.

It follows inexorably that withholding appellate correction of erroneous pre-trial denials of qualified immunity frustrates Harlow's purpose in revising the test. If timely appellate review is not available to redress incorrect preliminary rulings, the right to be relieved of the burdens of trial will, just as in *Abney*, be irretrievably lost. *See also Helstoski v. Meanor*, 442 U.S. 500 (1979). In summarizing *Cohen*'s rationale, Abney explained that "by permitting immediate appeal under those circumstances, this Court made sure that the benefits of the statute were not 'cancelled out.'" 431 U.S. at 662 n.7. The common thread running through *Abney*, *Helstoski*, and *Harlow* is the necessity for early appellate review to prevent subjecting defendants to unnecessary trials.

The Courts of Appeals for the Eighth Circuit and the District of Columbia have similarly concluded that preserving that exemption requires immediate appeal from denial of summary judgment based on qualified immunity. *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982). The *Dillahunty* court, however, properly cautioned that an order withholding qualified immunity is appealable only when the essential facts are not in dispute and the question is a matter of law.

In an unpublished opinion, the Court of Appeals for

the Fourth Circuit in *Benford v. American Broadcasting Co.*, No. 83-1168 (4th Cir. April 11, 1983), *cert. denied, Holton v. Benford*, 52 U.S.L.W. 3263 (1983), refused to entertain an appeal from a denial of summary judgment. In that case, the district court had concluded that the plaintiff's asserted rights had been clearly established at the time of the challenged conduct. I do not find the *Benford* opinion persuasive because in remitting the defendant to trial the court said that "there is no right irretrievably lost to them by this decision." That statement does not adequately heed *Harlow*, or credit its common denominator with *Abney* and *Helstoski* -- the right to be free from unnecessary trial.

The Fourth Circuit's later decision in *Bever v. Gilbertson*, Nos. 83-1790, 83-1791 (4th Cir. Jan. 11, 1984), is readily distinguishable. There, the court declined to take jurisdiction of a qualified immunity appeal because, in addition to damages, the plaintiffs had requested injunctive relief and trial was necessary on that claim whatever the resolution of the immunity question. Without commenting on the merits of that conclusion, I need only note that the Court of Appeals observed that the case was different from one, as here, where the effect of the immunity claim would terminate the litigation. I am persuaded that we focused on the proper standard in *Britton v. Howard Savings Bank*, No. 83-5216 (3d Cir. Jan. 31, 1984), where we said that "the most significant issue with respect to appealability of collateral orders is their effect on parties *pendente lite*, rather than the relationship of issues already decided to the ultimate merits."

I conclude that when no essential facts are in dispute and the question is one of law, the *Abney-Cohen* line of cases establishes jurisdiction for appeals from denials of qualified immunity. *Harlow*'s objectives require no less. Unlike the majority I find that

the denial of qualified immunity in this case presents us with an appealable order.

II

Having determined that this court has jurisdiction for both the qualified and absolute immunity phases, I turn to the merits. Although the majority finds that our earlier decision on absolute immunity is dispositive, I must confess some doubt on that score.

Harlow's discussion of the "special functions" test, as it might apply to the Attorney General in cases implicating national security, lends a force to the defendant's argument here that was lacking in *Forsyth I*. "For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest." *Harlow v. Fitzgerald*, 457 U.S. at 812. This "special functions" notion is different from the prosecutorial role we reviewed in *Forsyth I*. Arguably, it is much more likely that the Attorney General is eligible for special functions consideration than is the Secretary of Agriculture. *Cf. Butz v. Economou*, 438 U.S. 478 (1978). However, because I believe that qualified immunity is applicable here as a matter of law, I do not dwell on the absolute immunity issue.

The qualified immunity question is sharply drawn: was the requirement that the Attorney General of the United States secure judicial authorization for wiretaps undertaken for national security purposes "clearly established" before January 6, 1971.

The various sources to be surveyed in determining the state of the law at the pertinent time have not yet been identified but case law is an obvious beginning point. *See Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *Reese v. Nelson*, 598 F.2d 822 (3d Cir. 1979);

Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir. 1978).

A

The wiretap in the case at bar was removed on January 6, 1971. Not until 1972, one year and five months later, was the right to be free from warrantless governmental surveillance in domestic security cases recognized by the Supreme Court. The resolution of the problem was a sensitive issue requiring careful constitutional analysis and balancing. *See United States v. United States District Court*, 407 U.S. 297, 299 (1972) (*Keith*).

Keith observed that electronic surveillance in national security cases had been sanctioned since 1946. *Id.* at 310, & n.10. "Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time." *Id.* at 299.

The inquiry, as the Supreme Court posed it, was "the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. . . . Its resolution is a matter of national concern . . .." *Id.* The Court's opinion could not more clearly define the matter before it for decision.

Plaintiff argues, nevertheless, that the earlier case of *Katz v. United States*, 389 U.S. 347 (1967), "clearly established" his right to be free of searches conducted without prior judicial approval. In *Katz*, the defendant was charged with a gambling offense. His conversation in a telephone booth was intercepted by police officers who had attached a listening and recording device to the outside of the booth. The Court held that the police activity constituted a search requiring prior judicial approval.

It is significant that *Katz* was not a national security case, and the Court did not purport to decide the warrant issue in that context. Indeed, a footnote to the majority opinion disclaimed any such intention. "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case." 389 U.S. at 358 n.23. In a concurring opinion, Justice White, referring to that disavowal, wrote, "in foonote 23 the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping." *Id.* at 363. Only Justices Douglas and Brennan took exception to Justice White's statements. *See id.* at 359-60. The Court, referring to the question before it in *Keith*, said: "It addresses a question left open by *Katz*." 407 U.S. at 309. *See also Giordano v. United States*, 394 U.S. 310 (1969). I am convinced that before 1972 the law was not "clearly established" by the Supreme Court.

B

In reviewing other federal court decisions it is interesting that before 1971 the cases had not separated the national security justification for warrantless surveillance into the categories of "domestic" and "foreign" intelligence. As *Keith* observed, both situations were sometimes referred to as "national security" threats. 407 U.S. at 309, n.8. Not until January 8, 1971 -- after the wiretaps in this case had been terminated -- did a district court suggest that different tests might apply in each situation. *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971). In all the reported decisions antedating the surveillance here

-- *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970); *United States v. Butenko*, 318 F. Supp. 66 (D.N.J. 1970); *United States v. Brown*, 317 F. Supp. 531 (E.D. La. 1970); *United States v. Stone*,, 305 F. Supp. 75 (D.D.C. 1969); *United States v. O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969) -- the government advanced foreign intelligence grounds for warrantless electronic surveillance. In each instance, the court found no violation of the Constitution or the Communications Act of 1934, 48 Stat. 1103 (current version at 47 U.S.C. § 605 (1982)).

In two unreported decisions, *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. September 1, 1970), and *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. February 20, 1970), warrantless wiretaps were undertaken by the government on the basis of threats to domestic security. The surveillance was found to be proper in both of those cases. Although these unreported cases do not have the same effect as published opinions, they are relevant.

Thus the Attorney General's decision to authorize the wiretap here was made in an era when the sparse lower federal court case law unanimously supported the theory that no warrant was required in national security cases. These cases provide no support for the plaintiff's theory that the law was "clearly established." If anything, they suggest the opposite -- that settled law held no warrant was required.

Only after the taps here were terminated did a district court hold that electronic surveillance in domestic security cases required judicial authorization. *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal. 1971). Two weeks later the rationale of *Smith* was accepted and followed in *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), the case ultimately affirmed by the Supreme Court in *Keith*.

The first occasion for appellate review of whether

the law in this field was "clearly established" arose when some individuals overheard in the *Keith* surveillance sought damages from the Attorney General and others as a result of the taps which the Supreme Court had found to be illegal. In reviewing the grant of summary judgment in favor of the former Attorney General, the Court of Appeals for the District of Columbia concluded that the defendant had not violated "clearly established, authoritatively declared law." *Sinclair v. Kleindienst*, 645 F.2d 1080, 1084 (D.C. Cir. 1981). En route to reaching that result, the Court discussed cases I cited earlier.

Post-*Harlow*, that Court of Appeals again reviewed an Attorney General's entitlement to qualified immunity. *Zweibon v. Mitchell*, 720 F.2d 162 (D.C. Cir. 1983) (*Zweibon IV*). At issue were wiretaps authorized in the period from September 1970 through June 1971. After an exhaustive review of the case law, the court found that the illegality of the defendant's "conduct was not 'clearly established' by any reasonable definition of the phrase." *Id.* at 169. The court dismissed arguments that the *Smith* and *Sinclair* cases, decided by district courts in January 1971, established the state of the law. *Id.* at 171. Also rejected was plaintiff's suggestion that the validity of his position was established by memoranda prepared by the Attorney General's subordinates in 1969 professing some doubt on the constitutionality of national security wiretaps. These memos were characterized as mere predictions of future action by the Supreme Court and discussions of strategic considerations for potential litigation. *Id.* at 170-71.

The same Court of Appeals performed a similar review to determine the state of the law in 1977 with respect to foreign intelligence electronic surveillance. *Chagnon v. Bell*, 642 F.2d 1248 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981). Observing that *Keith* had

not resolved the issue, the court held that liability could not be imposed on the Attorney General "for failure to anticipate legislative reform." *Id.* at 1263. In the circumstances of the times, "the Attorney General was entitled to consider a broad range of options in exercising the wide scope of discretion that his post entails; he was also obligated to act swiftly and firmly at the risk that action deferred [would] be futile or constitute virtual abdication of office." *Id. quoting Scheuer v. Rhodes*, 416 U.S. at 246.

It is also significant that the Court of Appeals for the Ninth Circuit has concluded that the law was not even "clearly foreshadowed" when the Attorney General authorized wiretaps in 1969 and as late as 1972. *Weinberg v. Mitchell*, 588 F.2d 275 (9th Cir. 1978). *Cf. Zweibon v. Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979). As I have observed in the past, the "clearly established" standard requires more definitive explication and certainty than the "foreshadowing" test used in connection with the retroactivity doctrine.[1] *Marino v. Bowers*, 657 F.2d 1363, 1376 n.5 (3d Cir. 1981) (Weis, J., dissenting); *accord Zweibon v. Mitchell*, 720 F.2d 162 (D.C. Cir. 1983) (*Zweibon IV*). Since "clearly foreshadowed" is a lesser test, *Weinberg* is additional support for the proposition that the law was not "clearly established."

C

Contemporaneous statutes do not alter the conclusion that the law was not "clearly established." Court decisions of the period did not suggest that the Attorney General's procedure conflicted with extant statutory law.

Keith found that Title III of the Omnibus Crime

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1. The retroactivity of *Keith* is not before us at this time. I therefore have assumed retroactivity *arguendo*.

Control & Safe Streets Act, 18 U.S.C. §§ 2510-2520, authorizing wiretaps under certain conditions, did not resolve the issue in that case. The Court characterized the statute as an "expression of Congressional neutrality" and "not the measure of the executive authority asserted," 407 U.S. at 308. However, the proviso for presidential power, 18 U.S.C. § 2511(3),[2] had led several courts to conclude that wiretaps authorized by the Attorney General for national security purposes did not violate the statute. *See United States v. Clay*, 430 F.2d at 171-72; *United States v. Butenko*, 318 F. Supp. at 73; *United States v. Brown*, 317 F. Supp. at 536-37; *United States v. Dellinger*, No. 69 CR 180, Transcript at 20-21. *See also United States v. Stone*, 305 F. Supp. at 81-82; *United States v. O'Baugh*, 304 F. Supp. at 768 (Attorney General's procedure did not violate § 605 of Communications Act of 1934).[3]

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2. The proviso reads in part:

   "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

3. Legal commentators appear to have been uncertain about the import of the proviso. *Compare Schwartz*, "The Legitimation of Electronic Eavesdropping: The Politics of 'Law and Order,'" 67 MICH. L. REV. 455, 490-94 (1969) (section legitimates president's power); *with* Note, "Eavesdropping at the Government's Discretion -- First Amendment Implications of the National Security Eavesdropping Power," 56 CORNELL L. REV. 161, 162-63 (1970) (does not regulate president's power); *and* Note, "Wiretapping and Electronic Surveillance -- Title III of the Crime Control Act of 1968," 23 RUTGERS L. REV. 319, 334-36 (1969) (Congressional attempt to fill vacuum left by Court in *Katz*; section frees eavesdropping by authority of the President from requirements elsewhere in statute).

Since all of these courts also upheld the constitutionality of the warrantless surveillance, it is reasonable to conclude that Title III was at best neutral, if not in fact Congressional recognition of the President's power to continue to authorize surveillance.

The other statute pertaining to wiretaps, section 605 of the Federal Communications Act of 1934, 48 Stat. 1103, has no relevance here because its scope was limited to prohibiting the use of wiretapped conversations as evidence in court proceedings, a point not presented in the case at hand. *Cf., Nardone v. United States*, 302 U.S. 379 (1937); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950).

D

A survey of law review writings on the subject in 1968-70 is interesting. Although most of the commentators advocated the view that was later adopted in *Keith*, their urging of that approach is in itself a testimonial to the fact that their position was not yet the law.[4]

Thus a review of Supreme Court and other federal court decisions, the statutory provisions, and scholarly commentary all demonstrate that the law of warrantless electronic surveillance in national security

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4. Representative of the many articles written are: Spritzer, "Electronic Surveillance by Leave of the Magistrate: The Case in Opposition," 118 U. PA. L. REV. 169 (1969); Theoharis & Meyer, "The 'National Security' Justification for Electronic Eavesdropping: An Elusive Exception," 14 WAYNE L. REV. 749 (1968); Note, "Wiretapping and Electronic Surveillance -- Title III of the Crime control Act of 1968," 23 RUTGERS L. REV. 319 (1969); Comment, "Privacy and Political Freedom: Application of the Fourth Amendment to 'National Security' Investigations," 17 U.C.L.A. L. REV. 1205 (1970).

cases was only beginning to develop in 1970-71. Unquestionably, a prohibition against warrantless searches in these circumstances was not "clearly established."

III

The majority declines to consider the merits of the qualified immunity defense fearing that allowing a *Abney-Cohen* appeal will open the gates to a flood of interlocutory appeals. As one of those affected by the heavy case load in this court, I am not completely unsympathetic to that approach. However, I am not persuaded that it is the proper one because we must take a broader view of the federal judicial system. Sound judicial administration argues against declining a meritorious appeal when the result is to require a district court to hold a useless trial. We cannot ignore the fact that docket pressures exist in the trial as well as in the appellate courts.

The majority position is particularly regrettable in a case such as this where the question at issue is purely one of law and no discretionary element is present. The state of law in 1971 is a matter of history. The opinions are printed in bound volumes and will not change. The text of the statutes as they existed at that time cannot be varied either now or after trial. All of the material needed to decide the issue is before us and will be no different years from now.

But primarily, we should grant complete review to the legal question here because otherwise we fail to meet the obligation imposed upon us by *Harlow*. The Supreme Court candidly acknowledged that its previous decisions on qualified immunity were incompatible with speedy and inexpensive disposition of non-meritorious cases. To correct that shortcoming, the Court did not hesitate to revise the applicable test. However, that acknowledgment of deficiency and the

effort to put it aright will be all for naught if the courts of appeals fail to exercise jurisdiction in appropriate cases.

This court should not relegate to a later date the inevitable correction of an erroneous district court appraisal of past law. This litigation has lasted far too long. It should be terminated now.

Thirteen years ago plaintiff was overheard three times when he spoke with Davidon on the telephone. Plaintiff concedes that he suffered no pecuniary loss and his freedom of expression was not chilled. The district court has awarded one dollar as nominal damages, and the only claim remaining is for punitive damages. Remand for resolution of this issue will require a possibly lengthy trial, *see Forsyth v. Kleindienst*, 700 F.2d 104, 105-06 (3d Cir. 1983), and cause the precise harm *Harlow* seeks to avoid.

I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-1812

(D.C. Civil No. 72-1920)

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, ET AL.,
JOHN N. MITCHELL, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed Jan. 20, 1983]

Before: WEIS, SLOVITER and BECKER, *Circuit Judges.*

OPINION SUR GRANT OF STAY

WEIS, *Circuit Judge.*

Plaintiff Forsyth has moved to dismiss this appeal as interlocutory, and defendant Mitchell has asked for a stay of trial. We will grant the stay, deny the motion to dismiss the appeal on absolute immunity, and refer the motion to dismiss the appeal on qualified immunity to the merits panel.

Keith Forsyth filed this suit against former Attorney General John Mitchell and others[1] to recover damages for alleged constitutional and statutory violations. Mitchell authorized a warrantless wiretap of one William Davidon in 1970 that resulted in government officials overhearing conversations he had with the plaintiff. The factual allegations underlying the claim are set forth in a previous opinion in

[1] After the notice of appeal was filed, plaintiff dismissed his claims against Albert Cooper and David Porter.

this case. *See Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1205-06 (3d Cir. 1979) (Forsyth I), *cert. denied*, 453 U.S. 912 (1981).

In the earlier appeal, the district court had denied defendant's motion for summary judgment on the basis of absolute immunity. We concluded that the order was appealable because the absolute immunity defense, like that of double jeopardy, *see Abney* v. *United States*, 431 U.S. 651 (1977), protected the right not to be subjected to trial. *See also Nixon* v. *Fitzgerald*, ___ U.S. ___, 50 U.S.L.W. 4797 (June 24, 1982).

On the merits, we held that the "Attorney General's decision to authorize the warrantless electronic surveillances is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function; however, when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity." 599 F.2d at 1215. The district court had held that defendant acted as an administrator rather than an officer of the court, but had "provided us with no statement of the reasons for its decision." *Id.* at 1216. Consequently, we remanded to the district court for further consideration and application of the text we enunciated.

On remand, the district court again denied summary judgment to the defendant, finding that he was not entitled to absolute or qualified immunity. Finding no dispute about the fact that plaintiff had been overheard by virtue of the warrantless wiretap, the court entered summary judgment in favor of the plaintiff and against defendant on liability only. Since the record demonstrated that plaintiff had not suffered any compensatory loss, the case was set for trial on punitive damages only.

The defendant asked the district court for certification of the liability issue under 28 U.S.C. § 1292(b), and a stay pending appeal. Both motions were denied. Defendant has now appealed and seeks a delay of trial until this court has decided the issues he has raised here.

We first address plaintiff's contention that the appeal should be dismissed as interlocutory and frivolous. *Forsyth*

I established that a pretrial denial of summary judgment on the basis of absolute immunity is appealable. That precedent is binding on this panel, as is *Nixon* v. *Fitzgerald*. Consequentiy, the denial of summary judgment because of a finding by the district court that there is no absolute immunity presents us with an appealable order. We need not, and do not, decide at this juncture whether the denial of summary judgment on the ground of a lack of qualified immunity is also appealable. We note only that the question is not free from difficulty in the wake of the Supreme Court's pronouncements of the policy underlying the qualified immunity doctrine. *See Harlow* v. *Fitzgerald*, ___ U.S. ___, 50 U.S.L.W. 4815 (June 24, 1982); *McSurely* v. *McClellan*, Slip op. at 1-11 (No. 82-2369) (D.C. Cir. Dec. 10, 1982) (denial of qualified immunity is appealable). That issue will be referred to the merits panel.[2]

As the Supreme Court has made clear, absolute immunity protects the right not to be subjected to trial—a right that is lost if appellate review awaits final adjudication. It follows therefore, that a stay must be granted or the defendant will be deprived of the benefits of adjudication before trial. The fact that the district court granted summary judgment for the plaintiff on liability cannot deprive the defendant of his right to an immediate appeal which accrued on denial of his motion for summary judgment.

The defendant contends that his wiretap authorization had a direct judicial analogue and that *Harlow* raises the availability of a special functions absolute immunity. In the limited time available for the disposition of this motion, we cannot conclude that the appeal from the denial of absolute immunity is frivolous.

Our conclusion is not altered by the fact that only a trial on punitive damages remains in this case. In the present

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[2] The denial of qualified immunity in this case was characterized by the district court as one of law rather than fact. That holding therefore would not be affected by the trial on punitive damages. We note that the district court's adverse ruling on the state of the law in effect at the time the wiretaps were authorized differs from that of the court of appeals in *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084 (D.C. Cir. 1981).

posture of the litigation, it has been determined that the plaintiffs' conversations were overheard on three occasions. Although the plaintiff sustained no loss, in the absence of immunity of the defendant, a judgment for nominal damages would be entered. Only to that extent has there been a liability finding.

There has been no determination, however, as to whether punitive damages may be recovered. To determine this issue there must be inquiry into the circumstances surrounding the defendant's activities, his subjective intent, and the presence or absence of malice. We would expect a thorough examination of the background of the authorization, including possibly a review of what prompted the wiretaps, the advice defendant received from his subordinates, corroborating testimony from those sources, and other similar testimony. If, after that evidence, the fact finder determines that punitive damages are due, then the issue would shift to the proper amount. In connection with this phase of the case, testimony about defendant's financial condition would become relevant.

In sum, the inquiry into the factual issues remaining will not likely be merely a cursory one. Indeed, it may be as searching as the trial on the merits would have been in the absence of summary judgment on liability.

We share the concern of the dissent about the burdens under which this court is operating. However, we are not at liberty to disregard the clear precedent of *Forsyth I* on the appealability of a denial of absolute immunity.

Accordingly, defendant's motion for a stay of proceedings in the district court is granted. The motion to dismiss the appeal from denial of absolute immunity is denied. The plaintiff's motion to dismiss the appeal from the denial of qualified immunity is referred to the merits panel.

TO THE CLERK:

Please file the foregoing opinion.

_____

Circuit Judge

SLOVITER, *Circuit Judge*, dissenting.

I dissent from the denial of the motion to dismiss the appeal and from the grant of a stay.

One of the bedrock principles guiding judicial administration in the federal courts is discouragement of piecemeal appeals. The important purposes served by such a policy were reviewed recently by the Supreme Court: "to emphasiz[e] the deference that apellate courts owe to the trial judge" in order not to "undermine the independence of the district judge"; to "'avoi[d] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment''; and to "promot[e] efficient judicial administration". *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981) (quoting *Cobbledick* v. *United States*, 309 U.S 323, 325 (1940)).

Exceptions to the policy of appellate review of only final orders are few and narrowly construed. In the main, the exceptions are those set forth by Congress in the Judicial Code, *i.e.*, the provision permitting appellate review of orders granting or denying preliminary injunctions, 28 U.S.C. § 1292(a)(1), and the provision permitting appeals of interlocutory orders when certified to involve a controlling question of law as to which there is substantial ground for difference of opinion where an immediate appeal may materially advance the ultimate termination of the litigation, 28 U.S.C. § 1292(b).

In contrast, the other principal exception to review of final orders, the collateral order exception enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is judge-made and covers only a "small class" of orders. A "collateral order" must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 375 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

The policies which underlie the limitation of interlocutory appeallate review are patently applicable in this case.

Plaintiff filed his complaint in September 1972 alleging violation of 18 U.S.C. § 2520 and rights protected under the First, Fourth and Sixth Amendments as the result of the overhearing of his telephone conversations in a warrantless electronic surveillance authorized by defendant, former Attorney General John Mitchell. Following first a stay pending termination of a related criminal matter and then completion of discovery, defendants moved for summary judgment claiming absolute and qualified immunity and plaintiff also moved for summary judgment. The district court denied both summary judgment motions, and this court held that the denial of defendants' motions for summary judgment on the grounds of absolute immunity was appealable immediately under the *Cohen* collateral order doctrine but that the denial of summary judgment on the grounds of qualified immunity could not qualify for immediate review. *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207-09 (3d Cir. 1979) (*Forsyth I*), *cert. denied*, 453 U.S. 913 (1981). The validity of an absolute immunity defense does not easily satisfy the requirement for a *Cohen* collateral order that the issue on appeal must be separate from and collateral to the merits of the action. However, in *Forsyth I* we analogized absolute immunity to a claimed double jeopardy violation held subject to interlocutory review in *Abney* v. *United States*, 431 U.S. 651 (1977). The rationale given in *Abney* was that the rights conferred by the Double Jeopardy Clause, which guarantees against twice being put to trial for the same offense, would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentencing. *Id.* at 660-62. A similar consideration led the Court in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), to hold that a Member of Congress could appeal the district court's denial of a motion to dismiss an indictment alleging violation of the Constitution's Speech or Debate Clause. The Court held that an appeal lay because the Speech or Debate Clause was designed to protect Congressmen not only from the consequences of litigation but also from the burden of defending themselves. *Id.* at 507-08. The common thread running between *Abney* and *Helstoski* is a constitutional right, protected by an ex-

press constitutional provision. The absolute immunity defense afforded representatives of the Executive, albeit not constitutionally based, was deemed in *Forsyth I* to be important enough to warrant the same immediate appeal. We recognized that if former Attorney General Mitchell was correct in his claim that he was entitled to absolute immunity from civil liability for his decision to authorize the warrantless electronic surveillance, his right not to be subjected to trial would be irretrievably lost if appellate review must await final adjudication on the merits.

In considering the merits of Mitchell's claim, we rejected his argument that he was entitled to absolute immunity by virtue of his status as a high official of an executive agency. We relied on the Supreme Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), in holding that heads of federal executive agencies generally have only qualified immunity when violations of federal constitutional law are asserted. However, we also concluded that under the decision in *Imbler* v. *Pachtman, 424 U.S. 409 (1976)*, the Attorney General's decision to authorize the warrantless electronic surveillance is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function but not when the decision arises in the context of a purely investigative or administrative function. We remanded to the district court to determine whether Mitchell was entitled to the defense of absolute immunity under the legal principles we had enunciated in light of the evidence developed. The Supreme Court denied certiorari, 453 U.S. 913 (1981), and denied rehearing, 453 U.S. 928 (1981).

On remand, Mitchell chose to submit no additional testimony. Although given the opportunity by the trial court to present any evidence he wished concerning his purpose in approving the wiretaps, he relied on his previous deposition testimony to oppose plaintiff's motion for summary judgment. The district court reviewed "the uncontested facts" and determined that defendant Mitchell was not engaging in conduct subject to the prosecutorial absolute immunity of *Imbler* v. *Pachtman*. *Forsyth* v. *Kleindienst*, No. 72-1920, slip op. at 9-13 (E.D. Pa. Nov. 12, 1932). The court stressed the deposition testimony by Mitchell who "repeat-

edly stated that the Davidon wiretap had an investigatory purpose, *i.e.*, to obtain more details about the suspected plot to destroy utility tunnels in Washington, D.C. and to kidnap National Security Council Chairman Henry Kissenger so that the Justice Department, acting through the FBI, might thwart these schemes." *Id.* at 9. The district court concluded that "the purpose of the wiretap was prevention—not prosecution" and that Attorney General Mitchell "was not in any way weighing factors in order to determine whether and whom to prosecute." *Id.* The district court also held that defendant Mitchell was not entitled to qualified immunity because at the time of the wiretaps at issue in this case, there was clearly established law that made Mitchell's warrantless electronic surveillance an unconstitutional violation of the plaintiff's rights. *Id.* at 14-28.

The district court took cognizance of the recent Supreme Court decisions of *Nixon* v. *Fitzgerald*, 102 S. Ct. 2690 (1982), and *Harlow* v. *Fitzgerald*, 102 S. Ct. 2727 (1982). It held the *Nixon* decision applied by its terms only to the President and not to cabinet officers, such as the Attorney General. *Id.* at 13-14. The district court also held that Mitchell did not meet the test for qualified immunity formulated in the *Harlow* opinion. Having granted summary judgment to plaintiff on liability, the district court then scheduled the trial on the remaining issue of punitive damages. Thus, more than ten years after filing his complaint, plaintiff still waits for conclusion of the disrict court proceedings.

The majority cites two authorities for denying the motion to dismiss the appeal and according review at this interlocutory stage—our decision in *Forsyth I* and the Supreme Court's recent decision in *Nixon* v. *Fitzgerald*. I believe neither requires this result. Instead, I believe that *Nixon* v. *Fitzgerald* provides persuasive reason to reject this interlocutory review. In that case, the Court considered as a pereliminary matter whether the case had been "in" the Court of Appeals for the District of Columbia Circuit for purposes of Supreme Court certiorari jurisdiction within the meaning of 28 U.S.C. § 1254 (investing the Court with

authority to review "[c]ases in" the courts of appeals). The Court held that "[i]n light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers," former President Nixon did present a "serious and unsettled" and therefore appealable question to the court of appeals. 102 S. Ct. at 2698.

To apply the approach mandated by the Supreme Court in *Nixon* v. *Fitzgerald*, we must first inquire whether defendant Mitchell raises a "serious and unsettled" question as to his right to an absolute immunity defense. Otherwise, under *Nixon* v. *Fitzgerald* the collateral order doctrine is inapplicable. The legal issue of the circumstances under which absolute immunity would be available to defendant Mitchell has already been decided by this court in *Forsyth I*. Significantly, in his papers before us Mitchell does not suggest that the district court either misinterpreted or misapplied our decision in *Forsyth I*. Nor does he suggest that there are any disputed issues of fact. Thus, only if the Supreme Court's recent pronouncements on immunity in *Nixon* v. *Fitzgerald* or *Harlow* v. *Fitzgerald* mandate reversal of our precedent in *Forsyth I*, as defendant Mitchell suggests they do, would there be any basis for interlocutory review on the basis of the collateral order doctrine.

It is apparent from reading those opinions, a task we cannot shirk because of the limited time available for disposition of this motion, that there is no basis for any contention that they change the law on absolute immunity as enunciated in *Forsyth I*. And the district court found, the opinion in *Nixon* v. *Fitzgerald* is by its terms limited to the President. The opinion in *Harlow* v. *Fitzgerald* changes the law only with respect to qualified immunity, not absolute immunity. Indeed, the Court reiterated its earlier decisions in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and *Butz* v. *Economou*, *supra*, that qualified immunity, not absolute immunity, represents the norm.

The majority embraces Mitchell's contention "that *Harlow* raises the availability of a special functions absolute immunity." The references in *Harlow* to the absolute immunity which might be accorded on the basis of "special

functions" make it clear that the Court did not announce any new law but merely reiterated what it had previously said in *Butz* v. *Economou*. Mitchell concedes in his papers before us that he raised the "special functions" argument in *Forsyth I* and that it was *sub silentio* rejected by us. Appellant's Motion to Stay trial at 9. Since *Butz* was considered by this court in *Forsyth I* and the "special functions" immunity which defendant Mitchell tenaciously reiterates was rejected under these facts, I can see no basis for holding that Mitchell raises any "serious and unsettled" question regarding absolute immunity so as to qualify under the collateral order doctrine.

Similarly, I find no precedent in *Forsyth I* for grant of interlocutory review to Mitchell a second time under the collateral order doctrine. When we considered his absolute immunity claim the first time, we had not yet settled the various legal issues presented. That is no longer the case, and the considerations warranting early review there no longer apply.

Furthermore, the posture in which the denial of summary judgment reaches us now is substantially different than it was in *Forsyth I*. Unlike the earlier appeal, the liability phase has been completed since the district court granted summary judgment to the plaintiff on the issue of liability. The only two defenses proffered, that of absolute immunity and that of qualified immunity, have been rejected. While we justified our initial interlocutory review of the denial of summary judgment on the basis of absolute immunity so that defendant would be spared a trial which a favorable disposition on immunity would obviate, we can no longer rely on that ground since Mitchell no longer faces district court proceedings on liability.

Since the liability phase of this case has been concluded, this appeal reaches us in the same posture as that of an appeal from a decision granting plaintiff judgment of liability before damages have been determined, and the nonappealability of those orders is well established. *See, e.g., Catlin* v. *United States*, 324 U.S. 229 (1945); *Western Geophysical Co. of America, Inc.* v. *Bolt Associates, Inc.*, 463 F.2d 101, 102 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972). The

fact that liability was determined on summary judgment as distinguished from a bifurcated trial does not change the general principle that appellate review must await resolution of all of the plaintiff's claim. *See, e.g., Tye* v. *Hertz Drivurself Stations, Inc.*, 173 F.2d 317 (3d Cir. 1949).

The majority suggests that Mitchell is entitled to this second interlocutory appeal from the denial of summary judgment because the remaining trial on punitive damages will entail an inquiry into his activity, his subjective intent, the presence of malice, and his financial condition. Even if the defendant chooses to testify rather than rely on his deposition, once his immunity defense has been rejected he stands in the same posture as any other defendant who seeks immediate appeal from an adverse liability determination in the hope of avoiding the burdensome and sometimes embarrassing inquiry into damages. If we are not prepared to relax the general rule precluding appeals on liability decisions in bifurcated proceedings, I see no reason to relax it here merely because the defendant proffered an absolute immunity defense which has now been rejected by the trial court.

In summary, unlike the majority, I can find no binding precedent for reviewing for a second time the district court's denial of summary judgment on the basis of absolute immunity. The *ratio decidendi* of *Forsyth I* was accomplished when it enunciated the law applicable to an absolute immunity defense, and the district court applied the law to the uncontested facts. Since no new facts have been presented and no new legal principles as to absolute immunity have been enunciated by the Supreme Court, no "serious and unsettled" question is raised.

I am also troubled that the majority chooses to refer to the merits panel that portion of the appeal which is from the denial of summary judgment on the basis of qualified immunity. This court in *Forsyth I*, in an opinion which is binding upon us as precedent, held that the denial of summary judgment on the issue of qualified immunity did not fall within *Cohen*'s collateral order exception to the final judgment rule. 599 F.2d at 1209. While ordinarily a referral to the merits panel of a motion to dismiss an appeal does

not adversely affect a party's rights, in this case that action, combined with the stay of the trial on punitive damages, adds another unjustified delay to the ultimate conclusion of plaintiff's case.

I share what I am sure is the majority's concern that insubstantial claims against present or former government officials should not proceed to trial. *See Harlow* v. *Fitzgerald*, 102 S.Ct. at 2737. Yet one can hardly label plaintiff's claim on which he has been successful on liability in the trial court as "insubstantial". Moreover, I believe that concern over subjecting government officials to unwarranted claims is best handled through adjustment of the substantive rules of law, as the Supreme Court has recently done, and not by changing the established practice of limiting appellate review of interlocutory decisions. Mitchell is not the only defendant to raise the defense of absolute immunity in cases that come before us. Local, state and federal prosecutors do so regularly in cases in which they are named as defendants, and they are entitled to no less favorable treatment than the former Attorney General. Furthermore, if the majority's reference of the qualified immunity issue to the merits panel is to presage a change from our decision in *Forsyth I* that such appeals do not fall within the *Cohen* collateral order doctrine, then we can expect myriad interlocutory appeals from all of the other government officials who are frequently sued.

The pages of current legal publications are replete with justified concern about the crushing burden under which the courts of appeals are operating. I fear that the decision of the panel today to allow this appeal under the mantle of the *Cohen* collateral doctrine order and to deny the motion to dismiss will open the sluices to a flood of interlocutory appeals crushing us even further under a weight of our own making.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1812

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, ET AL.
JOHN N. MITCHELL, APPELLANT.

Present: WEIS, SLOVITER and BECKER, *Circuit Judges.*

ORDER

And now, to-wit, this 20th day of January, it is

ORDERED that the defendant's motion for a stay is granted, the motion to dismiss the appeal from the denial of absolute immunity is denied. The motion to dismiss the appeal from the denial of qualified immunity is referred to the merits panel.

BY THE COURT,

/s/ Weis
WEISS
Circuit Judge

DATED: JANUARY 20, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST ET AL.

[Filed Dec. 3, 1982]

MEMORANDUM

BRODERICK, J.

Defendants have filed with this Court a motion requesting the Court to certify for immediate interlocutory appeal its decision of November 12, 1982. For the reasons hereinafter set forth, the Court will deny defendants' motion.

Plaintiff Keith Forsyth ("Forsyth") initiated this action in 1972, seeking to recover damages in connection with the federal government's electronic interception of telephone conversations that he had with Professor William Davidon, the subject of a government wiretap. Plaintiff contends that these interceptions violated his rights under 18 U.S.C. § 2510, *et seq.* (The Omnibus Crime Control Act) and the First, Fourth and Ninth Amendments of the Constitution. Though plaintiff's complaint originally named former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray, he subsequently admitted that the claims against them should be dismissed. On February 14, 1978, the Court entered an order dismissing plaintiff's complaint as to these two defendants. The defendants remaining in this action are former United States Attorney General John Mitchell, who authorized the wiretap at issue, and two employees of the Federal Bureau of Investigation ("FBI"),

who actually intercepted the conversations involving plaintiff.

After discovery was completed, both parties filed cross-motions for summary judgment, which the Court denied in its Memorandum of February 14, 1978 (447 F. Supp. 191 (E.D. Pa. 1978)). The United States Court of Appeals for the Third Circuit under the "collateral order doctrine" heard the appeal on behalf of defendant Mitchell in connection with his claim of absolute immunity but determined that the denial of the motion for summary judgment as to qualified immunity was not appealable. The Third Circuit subsequently remanded this case and that of *Burkhardt* v. *Saxbe*, 448 F. Supp. 588 (E.D. Pa. 1978) "to conduct any additional inquiry that may be necessary" to determine the scope of official immunity of defendant former Attorney General John Mitchell, a defendant in this case. *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979), *cert. denied*, 453 U.S. 913, *reh. denied*, 453 U.S. 928 (1981). Pursuant to the remand, this Court held a hearing and in its Memorandum and Order of November 12, 1982 determined that defendant Mitchell was not entitled to absolute immunity under the standard set forth by the Third Circuit and that factual issues requiring trial remained to be determined in order to determine the liability of the two FBI agents who conducted the wiretapping at issue in this case and to determine the damages suffered by plaintiff Forsyth. The Court also granted summary judgment in favor of the plaintiff as to the liability only of defendant Mitchell based on the recent United States Supreme Court decision of *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982). *Harlow* announced a refinement in the traditional law of qualified immunity as applied to government officials performing discretionary functions. Under the *Harlow* standard, a government official is immune from suit if the law was not clearly established at the time of the official's allegedly wrongful conduct. This Court, in reliance on *Harlow*, determined that such officials are liable in the event they violated clearly established law. The *Harlow* adjustment of official immunity has made irrelevant the subjective good faith of such government officials performing discretionary

acts in a clearly illegal manner. *See* Memorandum of November 12, 1982 at 33-36. *See also Saunders* v. *Parole Agents*, Civil Action No. 81-930 (E.D. Pa. Sept. 30, 1982) (Luongo, Ch. J.); *Druckenmiller* v. *United States*, Civil Action No. 82-0970 (E.D. Pa. Oct. 1, 1982) (Troutman, J.).

Upon reviewing the law of electronic surveillance as it existed in late 1970 and early 1971, the time of the wiretaps at issue in this case, this Court determined that the clearly established law of that time made defendant Mitchell's warrantless electronic surveillance an unconstitutional violation of the plaintiff's rights. *See* Memorandum of November 12, 1982 at 13-28. For that reason, the Court applied *Harlow* to the instant case and granted plaintiff's motion for summary judgment as to the liability only of defendant John Mitchell. The Court denied the remainder of plaintiff's summary judgment motion, denied defendants' summary judgment motion, and set a trial date of December 15, 1982 for the purpose of determining the liability of Albert Cooper and David Porter, the FBI agents who conducted the electronic surveillance at issue in this case, and for the purpose of determining damages suffered by plaintiff Keith Forsyth. The Third Circuit's remand concerned only defendant Mitchell. (599 F.2d 1203).

On November 24, 1982, the defendants filed a motion for certification pursuant to 28 U.S.C. § 1212(b). On December 2, 1982, plaintiff filed a response opposing defendant's motion. For the reasons hereinafter set forth, the Court will enter an order denying the motion.

Title 28, § 1292(b) of the United States Code provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order.

Thus, a district judge is authorized pursuant to § 1292(b) to certify for appeal a nonfinal order that involves a controlling question of law as to which there is substantial ground

for difference of opinion if he believes that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court's Order of November 12, 1982 granting partial summary judgment in favor of the plaintiff as to defendant Mitchell's liability and denying other aspects of the cross-motions for summary judgment is not a final, appealable Order. Section 1292(b), certification for interlocutory appeal, is to be used only in exceptional cases. *See Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) (en banc). The critical issue in each case is whether certification would promote the policies underlying interlocutory appeals, including the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.) (en banc), *cert. denied*, 419 U.S 885 (1974); *McNulty* v. *Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *In re Magic Marker Securities Litigation*, 472 F. Supp. 436 (E.D. Pa. 1979).

Defendants contended that there is substantial ground for difference of opinion as to the effect of *Harlow* v. *Fitzgerald, supra*, on this case. This Court does not agree. Defendants contend that this Court's interpretation of *Harlow* may differ from other court applications of *Harlow*. However, Courts in the Eastern District of Pennsylvania have read *Harlow* as eliminating the subjective good faith components of a qualified immunity defense where the defendant is a government official performing discretionary functions. *See Saunders* v. *Parole Agents, supra; Druckenmiller* v. *United States, supra*. Memorandum of November 12, 1982 at 33-38. The law of electronic surveillance was clearly established in 1970 and this law clearly forbade warrantless wiretapping for national security purposes. *See Katz* v. *United States*, 389 U.S. 347 (1967). In 1972, the United States Supreme Court underscored the clarity of this law by unanimously holding that such warrantless wiretapping was illegal and unconstitutional and that defendant Mitchell's attempted justification for warrantless wiretapping was without any legal justifica-

tion. *See United States* v. *United States District Court (Keith)*, 407 U.S. 297 (1972).

Even if this Court were to accept defendants' argument that there existed a substantial difference of opinion regarding this Court's determination of the applicable law as to defendant Mitchell, the requirements of 28 U.S.C. § 1292(b) would nevertheless remain unsatisfied. Section 1292(b) also requires that, in order to certify an interlocutory question for appeal, the district judge find that an immediate appeal would advance the ultimate termination of the litigation. In this instance, the Court has determined that interlocutory appeal would fail to advance the conclusion of this already 10-year-old case and that an appeal would at this time, once again, delay the ultimate termination of the litigation.

In *Forsyth* v. *Kleindienst* (599 F.2d at 1205), the Third Circuit rejected the contention that the FBI agents were entitled to absolute immunity. Therefore, there is no difference of opinion regarding this Court's determination that the FBI agents are entitled only to a qualified good faith immunity. As the Court noted in its Memorandum of November 12, 1982, the FBI agents are entitled to qualify immunity if they (1) reasonably believed that their actions were not against the law and did not have reason to know that their actions would violate the law; and (2) did not engage in the challenged conduct with a malicious intention to deprive the plaintiff of a constitutional right (at 28). Resolution of the FBI agents' qualified immunity defense is not affected by *Harlow*, the legal standards of which apply only to government officials performing discretionary functions. A determination of the FBI agents' entitlement to qualified immunity thus requires trial and fact-finding. The Court had previously made this same determination in its Memorandum of February 14, 1978, 447 F. Supp. 191, 195 (E.D. Pa. 1978). Thus, it is beyond doubt at this juncture that trial will be required in this matter regardless of whether defendant Mitchell should prevail on any appeal challenging this Court's determination that the plaintiff is entitled to summary judgment as to the liability only of defendant Mitchell. Therefore, an interlocutory appeal raising defend-

ant Mitchell's argument in opposition to this Court's Memorandum of November 12, 1982 would not advance the ultimate termination of this litigation. Such an appeal would once again delay the completion of this case.

As heretofore noted, this action was filed in 1972. Discovery was cumbersome and protracted. It was not until 1977 that this Court received the parties' cross-motions for summary judgment. The Court denied these motions in early 1978. The government sought reconsideration but, while this Court was considering the reconsideration motion, the government appealed to the Third Circuit. After the Third Circuit decision remanded to this Court the question of Attorney General Mitchell's absolute immunity, the government sought certiorari, which was denied in 1981. Thereafter, this Court, accommodating the requests of the government, was not able to hold the hearing required by remand until early 1982. In June 1982, the *Harlow* decision required this Court to further revise its analysis of defendant Mitchell's scope of immunity. This litigation has already been delayed too long. Permitting an interlocutory appeal would not only run contrary to the express language of § 1292(b), but would mean further delay.

Furthermore, defendant Mitchell will not be prejudiced or harmed pendente lite by trial in this matter as to the FBI agents and as to plaintiff's damages. A major policy underpinning the doctrine of official immunity, both absolute and qualified, is a desire to spare high-ranking government officials the time, diversion and expense of discovery and trial. In this case, discovery is completed and Mr. Mitchell need not undergo any proceedings concerning his liability, which has already been determined by this Court as a matter of law pursuant to *Harlow*. A post-trial appeal by defendant Mitchell will serve his legal and financial interests every bit as well as would an interlocutory appeal.

The Court will therefore enter an Order denying the government's motion for certification pursuant to 28 U.S.C. § 1292(b). In connection with that motion, the government has also requested that this Court stay the proceedings in this matter if certification is granted. Since the Court will not certify this case for interlocutory appeal, the govern-

ment's stay request is moot and the Court will deny a stay. The government has also requested a continuance of the trial and hearing date of December 15, 1982. In order to accommodate the scheduling demands of the government's counsel, the Court will grant this request and set a rescheduled trial date of January 14, 1983. An appropriate order accordingly will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, ET AL.

ORDER

AND NOW, this 3rd day of December, 1982, upon consideration of defendants' motion for certification pursuant to 28 U.S.C. § 1292(b) and for a stay, and plaintiff's response thereto, for the reasons set forth in this Court's Memorandum of December 3, 1982,

IT IS HEREBY ORDERED:

1. The Motion for Certification Pursuant to 28 U.S.C. § 1292(b) filed by defendants John Mitchell, Albert Cooper, and David Porter is DENIED;

2. The Motion for a Stay of Proceedings in this matter pending certification for interlocutory appeal is DENIED;

3. Trial in this matter for the purpose of determining the liability of defendants Albert Cooper and David Porter, the FBI agents who conducted the electronic surveillance at issue in this case, and for the purpose of determining damages suffered by plaintiff Keith Forsyth is rescheduled for January 14, 1983 at 9:30 a.m. in Courtroom 10-b of this United States Courthouse, 601 Market Street, Philadelphia, Pennyslvania.

/s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, ET AL

[Filed Nov. 12, 1982

MEMORANDUM

BRODERICK, J.

I. FACTS AND PROCEDURAL HISTORY OF CASE

Plaintiff Keith Forsyth ("Forsyth") initiated this action in 1972, seeking to recover damages in connection with the federal government's electronic interception of telephone conversations that he had with Professor William Davidon ("Davidon"), the subject of a government wiretap. Plaintiff contends that these interceptions violated his rights under 18 U.S.C. § 2510, *et. seq.* (The Omnibus Crime Control Act) and the First, Fourth and Ninth Amendments of the Constitution. Though plaintiff's complaint originally named former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray, he subsequently admitted that the claims against them should be dismissed. On February 14, 1978, the Court entered an order dismissing plaintiff's complaint as to these two defendants. The defendants remaining in this action are former United States Attorney General John Mitchell, who authorized the wiretap at issue, and two employees of the Federal Bureau of Investigation ("FBI"), who actually intercepted the conversation involving plaintiff.

It is undisputed that the wiretap placed upon Davidon's telephone was warrantless and without court approval. The

electronic surveillance was in effect during December, 1970 and January, 1971. Conversations involving Forsyth were intercepted on three occasions in early December, 1970 and were recorded by the government. None of these interceptions involved conversations between the plaintiff and his attorney. One conversation between Forsyth and Davidon was disclosed in camera to a judge presiding over a criminal proceeding in which Davidon's activities were considered. Other than this disclosure, the government made no use of disclosure of any of Forsyth's intercepted conversations with Davidon. Plaintiff and the defendants have stipulated, regarding plaintiff's private right of action pursuant to the Fourth Amendment, that Forsyth has suffered no pecuniary losses, loss of financial advantages, impairment of reputation, pain and suffering, and has neither been inhibited nor chilled in the exercise of his First Amendment rights as a consequence of being overheard in the course of the warrantless electronic surveillance at issue in this case. (Docket No. 36, filed March 2, 1976).

After discovery was completed, both parties moved for summary judgment. In its Memorandum of February 14, 1978, the Court denied both motions, 447 F. Supp. 192 (E.D. Pa. 1978). The United States Court of Appeals for the Third Circuit subsequently remanded this case and that of *Burkhart* v. *Saxbe*, 448 F. Supp. 588 (E.D. Pa. 1978), "to conduct any additional inquiry that may be necessary and to apply the test [for determining the scope of official immunity to be accorded Attorney General Mitchell] enunciated here." *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1217 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981), *reh. denied*, 453 U.S. 928 (1981). The Third Circuit decision otherwise affirmed the factual findings and legal conclusions of this Court. This Court was instructed to determine, however, whether defendant Mitchell should be accorded an absolute immunity from suit in light of the Third Circuit's *Forsyth* test and the seminal Supreme Court cases of *Butz* v. *Economou*, 438 U.S 478 (1978), and *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), or whether he is entitled to only a qualified good faith immunity. Thus, this case was remanded for determination of a narrow question. A hearing

was held in this matter on January 8, 1982. At the hearing, the government submitted an additional affidavit and exhibits and asked this Court to reconsider its earlier denial of the government's summary judgment motion as well as its other legal conclusions adverse to the government. For the reasons hereinafter set forth, the Court determines that former Attorney General Mitchell is not entitled to absolute immunity under the circumstances of this case. The Court will grant plaintiff's motion as to liability only as to John Mitchell.

II. THE TEST FOR ASSESSING THE SCOPE OF DEFENDANT MITCHELL'S IMMUNITY

In *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), the Third Circuit presented an exhaustive discussion of the state of the law regarding the immunity of federal government officials sued by plaintiffs alleging that the officials had deprived them of a federal constitutional right, 599 F.2d at 1209-17. The Third Circuit stated that under *Imbler* v. *Pachtman*, *supra*, a government attorney possesses absolute immunity from suit for actions taken while he was acting in a prosecutorial capacity but that he possesses only a qualified good faith immunity for his actions as an administrator, investigator, or supervisor of department activities other than specific litigation. The Court recognized, however, that the distinction between these roles may not always be clear. Said the Court:

> This case, dealing essentially with investigative activity, is within the gray area. We recognize that the decision of the Attorney General or a prosecuting attorney is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decision-making and the potential for needless actions. We believe that the *right to make the decision without being subject to suit must include some limited right to gather necessary information.* At the same time, we are sensitive to the possibility that this narrow excep-

> tion could be distorted to include all of a prosecutors' investigative activities. We hold only that *to the extent that the securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself.*
>
> * * *
>
> Our reading of *Butz* and *Imbler* leads us to the conclusion that the Attorney General's decision to authorize the warrantless electronic surveillance is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function [prosecution]; however, *when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity.*

599 F.2d at 1215 (emphasis added and citation omitted).

The government has also urged this Court to consider whether former Attorney General Mitchell, as the ranking Justice Department official empowered, within the executive branch, to approve warrantless national security wiretaps, enjoyed quasi-judicial absolute immunity similar to the judicial absolute immunity of a magistrate or judge approving such wiretaps. The government reasons that defendant Mitchell's role in approving the wiretaps, pursuant to the orders of President Lyndon Johnson, paralleled that of a magistrate (Government pre-hearing brief at 12). However, a close reading of the Third Circuit's opinion in this case indicates that the Third Circuit was well aware that *Butz* v. *Economou* contains language which may be read as creating an absolute immunity for non-judicial branch officials acting in an adjudicatory role. 438 U.S. at 512-15, 599 F.2d at 1210. However, the Circuit Court did not find the instant case to fall within this narrow subset of immunity cases. Rather, the appellate decision focused on the applicable test for determining whether defendant Mitchell was acting within a prosecutorial role and thus entitled to absolute immunity. 599 F.2d at 1211-17.

The instant case was remanded to this Court to determine whether defendant Mitchell met the "prosecutorial" quasi-judicial immunity of *Imbler* and *Butz*, not whether Mitchell might receive the "adjudicatory" quasi-judicial im-

munity mentioned in *Butz* and accorded to Administrative Law Judges. If this Court were to determine this possible basis for immunity, it would conclude that defendant Mitchell was not engaged in a sufficiently adjudicatory role when approving the wiretap at issue. His decisions approving this and other electronic surveillance were merely part of the executive branch's internal procedure for instituting such surveillance. It appears to this Court that this decision-making process was placed in the hands of the Attorney General who, as the Attorney General, has the ultimate responsibility for the operations of the FBI. At the time when the Davidon wiretap was commenced, the District of Columbia was amply supplied with magistrates and judges from whom the Justice Department could have easily sought a warrant for the wiretap, requesting that the record of the proceeding be sealed in the interests of national security. Instead, the executive branch operated its own system of commencing wiretaps apart from the judiciary, with the Attorney General substituting his approval in lieu of a warrant. It would create a dangerous precedent for this Court to approve this procedure in which the Justice Department acted as its own in-house "judicial" oversight. Defendant Mitchell may only receive absolute immunity if he meets the "prosecutorial role" test enunciated by the Third Circuit.

Imbler v. *Pachtman* held "only that in initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil suit for damages under [42 U.S.C.] § 1983." 424 U.S. at 431. As the Third Circuit observed, the Supreme Court in *Imbler* "utilized a functional approach. It suggested that even a prosecuting attorney would not be absolutely immune from suit for actions which are not closely connected with the judicial process." 599 F.2d at 1213.

III. DEFENDANT MITCHELL'S ACTIONS IN THIS CASE

In reviewing the record in this case, the Court must determine whether defendant Mitchell's authorization of the wiretap affecting the plaintiff was "closely connected with the judicial process" and whether it was "necessary to ini-

tiate a criminal prosecution." Based on the record of this case, the Court determines that defendant Mitchell's conduct was not so closely connected or essential to a criminal prosecution to bring him within the "quasi-judicial immunity" discussed in *Imbler* v. *Butz*.

The Court has previously reached this determination in making its first decision as to the cross-motions for summary judgment, (*see* 447 F. Supp. 192, 201) in which Memorandum the Court found that defendant Mitchell was not entitled to absolute immunity because he "was functioning as an administrator rather than as an officer of the court." (447 F. Supp. at 201). Implicit in the Court's ruling was a determination that Mitchell had not been acting to gather information necessary for a criminal prosecution but that he was acting in an investigative capacity so that his activities fell outside the scope of the absolute immunity discussed in *Imbler* v. *Pachtman*, *supra*, a decision that preceded this Court's Memorandum of February 14, 1978. In again reviewing the uncontested facts in deciding the cross-motions for summary judgment pursuant to the Third Circuit's remand, the Court once again determines that defendant Mitchell was not engaging in conduct subject to the prosecutorial absolute immunity of *Imbler* v. *Pachtman*.

In his deposition, defendant Mitchell repeatedly stated that the Davidon wiretap had an investigatory purpose, *i.e.*, to obtain more details about the suspected plot to destroy utility tunnels in Washington, D.C. and to kidnap National Security Council Chairman Henry Kissinger so that the Justice Department, acting through the FBI, might thwart these schemes. The purpose of the wiretap was prevention—not prosecution. Therefore, the information gathering that took place was not "necessary to a prosecutor's decision to initiate a criminal prosecution", 599 F.2d at 1215. It appears, based on this record, that Attorney General Mitchell was not in any way weighing factors in order to determine whether and whom to prosecute. He was already quite aware of the existence of the plots and some of the individuals involved. The Justice Department sought more specific information about the operationalization of the plots so that it might prevent their success. The Justice

Department already had sufficient information to seek an indictment or information against Davidon, Father Phillip Berrigan and Sister Elizabeth McAlister, the three persons who had discussed the possibility of kidnapping Henry Kissenger (*see* 447 F. Supp. at 195). Thus, the Davidon wiretap was not directed at obtaining evidence in order to make a criminal case against these three or any of their associates. *See* depositions of John N. Mitchell: October 23, 1975 at 16-20, 28-32, 48-60 (in *Forsyth* v. *Kleindienst*) and October 14, 1976 (in *Burkhart* v. *Saxbe*) at 6.

Furthermore, Mr. Mitchell himself stated that as Attorney General he was not advised of the initiation of criminal proceedings by the Justice Department and that he did not know if a criminal investigation was pending regarding Davidon or other members involved in the utility tunnel and Kissenger plots. In his deposition of October 23, 1975 at page 30, Mr. Mitchell was asked:

> Q. When you received this request [from FBI Director J. Edgar Hoover for authorization for the Davidon wiretap], did it occur to you that the information that could be obtained or would be obtained as a result of this tap could be used in a criminal proceeding prosecution?
>
> A. It was not the point of my focus in authorizing the electronic surveillance.
>
> Q. What was the point of your focus?
>
> A. The gathering of information necessary to protect the national security and to get information on foreign intelligence.

At no time in the course of this litigation has defendant Mitchell repudiated the aforementioned statements or any other portion of his deposition. After the Third Circuit's remand, this Court set a hearing for the purpose of determining whether the Attorney General authorized the wiretaps in this case for the purpose of obtaining information to initiate a criminal prosecution, or whether defendant Mitchell acted as an investigator and/or administrator (Order of December 1, 1981). Prior to the entry of this Order, several conferences were held in chambers. At these conferences and at the outset of the hearing of January 8, 1982, the Court informed both parties that they could present any

evidence they wished concerning Attorney General Mitchell's purpose in approving the wiretaps. Prior to the hearing of January 8, 1982, the government filed a memorandum of law, an affidavit, and several accompanying exhibits. At no time, however, did the government present any evidence, documentary, testimonial, or otherwise, suggesting that defendant Mitchell meant anything other than what was said in his deposition. The Attorney General stated that he approved the wiretaps as part of a national security investigation. The Court has taken defendant Mitchell at his word.

The government has submitted several exhibits designed to show that there was ample cause to commence criminal prosecution of Prof. Davidon, the Berrigans, and their associates. However, none of these materials address the issue of defendant Mitchell's role in approving the wiretap as issue. If anything, the government's submissions in this regard show that the Davidon wiretap was not necessary for gathering information to commence criminal actions against the Berrigans and their associates but that the Davidon tap could have been installed only for investigative purposes. If Davidon and persons with whom he spoke (*e.g.*, Forsyth) were to be criminally prosecuted, then the electronic surveillance would clearly be outside the purported "national security" exception of the Fourth Amendment's warrant requirement which the government contended existed until this position was flatly rejected by the United States Supreme Court in *United States* v. *United States District Court*, 407 U.S. 297 (1972) (hereinafter cited as *Keith*).

Thus, regardless of whether the Davidon wiretap was motivated by a legitimate national security concern or a good faith belief that there existed a legitimate national security concern, as the defendants contend, or was an invasion of the privacy of political dissidents conducted under the guise of national security, as the plaintiff contends, there is no doubt that defendant Mitchell has consistently taken the position that the Davidon tap "arose in the context of a purely investigative or administrative function" on his part. Applying the test set forth by the Third Circuit, this Court concludes that defendant Mitchell does not have

absolute immunity from suit in this matter but is limited to a good faith immunity.

IV. RECENT SUPREME COURT DECISIONS AND THE CLARITY OF PLAINTIFF'S CONSTITUTIONAL PROTECTION AGAINST WARRANTLESS ELECTRONIC SURVEILLANCE

Defendant contends that the recent Supreme Court decisions of *Nixon* v. *Fitzgerald*, 102 S.Ct. 2690 (1982) and *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982) require a different result. However, the *Fitzgerald* cases, which concerned the scope of the President's absolute immunity and the scope of a government officer's qualified immunity, do not afford immunity to defendant Mitchell in this case. *Nixon* v. *Fitzgerald* held that a former President of the United States is entitled to absolute immunity from liability for damages predicated upon his official acts (102 S.Ct. at 2701). In reaching this holding, the Court continued to apply a functional test for determining the scope of immunity of government officials as developed in cases such as *Butz* v. *Economou*, 438 U.S. 478 (1978) and *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). *Nixon* v. *Fitzgerald* did not repudiate these cases but took pains to delineate how it was in fact consistent with the court's previous holdings regarding official immunity. *See* 102 S.Ct. at 2699-2702. The court determined that the President's "unique status under the Constitution distinguishes him from other executive officials." (102 S.Ct. at 2702). The court expressly distinguished the President's situation from that of cabinet officers such as the attorney general. *See* 102 S.Ct. at 2702. Thus, the recent *Nixon* v. *Fitzgerald* decision does not bolster the defendant's argument for absolute immunity, an argument which this Court has rejected (pp. 8-11, *supra*).

Harlow v. *Fitzgerald* did, however, enunciate a test for the qualified immunity of government officials that may be viewed as more favorable to the defendant. *See* 102 S.Ct. at 2738. However, defendant Mitchell does not meet the test for qualified immunity formulated by Justice Powell in *Harlow*. In *Harlow*, the Court noted that

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees [citing *Butz* v. *Economou*, *supra*, and *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)].

* * *

Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of far-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known [citing *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Wood* v. *Strickland*, 420 U.S. 308 (1975)].

* * *

On summary judgment, the judge appropriately may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

* * *

Where an official could be expected to know that certain conduct would violate statutory or constitu-

> tional rights, he should be made to hesitate, and a person who suffers injury caused by such conduct may have a cause of action.

102 S.Ct. at 2738-2739 (footnotes omitted).

Thus, to determine whether defendant Mitchell has established a qualified immunity based upon the status of the applicable law at the time of the wiretap, the Court has examined the applicable case law of warrantless searches as it existed in late 1970 at the time that defendant Mitchell authorized the warrantless wiretap of Professor Davidon. In 1972, the U.S. Supreme Court, in *United States* v. *United States District Court (Keith)*, 407 U.S. 297 (1972) held that electronic surveillance conducted for national security purposes is subject to the general Fourth Amendment law which requires a warrant issued by a judicial officer before the government may tap the phone of one of its citizens (407 U.S. at 320-322). In *Keith*, the Supreme Court applied the teachings of *Katz* v. *Unied States*, 389 U.S. at 347 (1967) to wiretaps conducted in the interests of protecting national security from domestic threats. The Court upheld the general rule of *Katz* against the government's contention that the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et. seq.* provided a grant of power to the President with respect to domestic national security matters. In fact, the Court stated that the law of electronic searches made it clear that electronic surveillance in domestic security matters requires an appropriate prior warrant procedure. The *Keith* majority opinion reached this conclusion with little difficulty because of the clarity of the existing precedents, including the 18th Century opinions of Lord Mansfield (407 U.S. at 316). Said the court:

> Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. [citing *Beck* v. *Ohio*, 379 U.S. 89 (1964)].
>
> * * *
>
> It is true that there have been some exceptions to the warrant requirement [citing cases]. But those exceptions are few in number and carefully delineated [citing Katz], in general they serve the legitimate needs of law enforcement officials to protect their own

> well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the 'police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' [citing *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *Chimel* v. *California*, 395 U.S. 752, 762, *reh. denied*, 396 U.S. 869 (1969)].

407 U.S. at 318.

The *Keith* opinion clearly states that its holding is no break with the past but rather a logical application of the existing law. For this reason, the District of Columbia Circuit in *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979) *cert. denied*, 453 U.S. 912, *reh. denied*, 453 U.S. 928, *reh. denied*, 453 U.S. 928 (1981) (*Zweibon III*) held that *Keith* was retroactive in effect. Applying the test for retroactive application set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the D.C. Circuit found that *Keith* did not directly overrule past precedent and announced a rule foreshadowed by the Supreme Court's pre-1972 decision such as *Katz* v. *United States*, *supra*. Said the D.C. Circuit:

> Statements by the Supreme Court in the late 1960s certainly demonstrated great concern over unrestrained warrantless wiretapping. Extension of that concern to the national security sphere was certainly likely, though perhaps not inevitable.
>
> * * *
>
> We believe that [*Keith* and other earlier cases] did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations. As a result, we cannot say that the outcome in those cases was not clearly foreshadowed.

606 F.2d at 1178. In *Zweibon III*, the D.C. Circuit also found there was no basis in law for limiting the warrant requirement for domestic national security surveillance to prospective application, holding that such limited application would not be consistent with the purpose and effect of the warrant requirement, the purpose of minimizing government invasion of personal privacy (606 F.2d at 1179-80), and that equitable considerations supported retrospective application of the *Keith* holding (606 F.2d at 1180-81).

Furthermore, the district court decision in *Keith* was entered on January 25, 1971 (321 F. Supp. 1074 (E.D. Mich. 1971)), the culmination of a series of events subsequent to a criminal defendant's motion to compel disclosure of certain electronic surveillance information and determine whether such evidence was unconstitutionally tainted. That motion was filed on October 5, 1970, more than one month prior to the Attorney General's authorizaton of the wiretap at issue in this case. The government responded to the motion on December 18, 1970. Thus, during the time of the Davidon tap (December, 1970 and January, 1971), the Justice Department had reason to know that its position regarding the need for a warrant was subject to both question and attack. After January 25, 1971, the government had overwhelming reason to know that its conduct was unconstitutional. The Eastern District of Michigan's decision was affirmed by the Sixth Circuit (444 F.2d 651 (1971)) and the Supreme Court. Under these circumstances, the *Keith* decision was clearly not a "sharp break in the law."

Though the Ninth Circuit Court of Appeals reached a different conclusion as to retrospective application of the *Keith* holding (*see Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978), this court finds the detailed and well-reasoned opinion of the D.C. Circuit more persuasive than that of the Ninth Circuit. An examination of the *Katz* case supports the D.C. Circuit's view that *Keith* did not tell the Attorney General and other attorneys anything which they should not already have known concerning the Fourth Amendment protections applicable to electronic surveillance.

In *Katz*, the Supreme Court held that wiretaps constituted "search and seizure" within the meaning of the Fourth Amendment and that such surveillance was subject to the Fourth Amendment requirements that such searches be conducted, subject to a few narrow and limited exceptions, pursuant to a search warrant issued by a neutral and detached magistrate or judicial officer. The *Katz* court noted that

> Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes [citing *United States* v.

> *Jeffers*, 342 U.S. 48 (1951)] and that *searches conducted outside the judicial process, without prior approval by a judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.*

389 U.S. at 357 (footnotes omitted; emphasis added). The *Katz* court further found that the government, in seeking to obtain evidence regarding Mr. Katz's allegedly illegal gambling, had not met any exception to the requirement of a warrant. In *Katz*, the court declined to give its holding only a prospective effect, even though the issue of whether wiretaps were "searches and seizures" was at least as unsettled as the issue [resolved in *Keith*] as to whether domestic national security wiretaps were subject to less constitutional protection than criminal activity wiretaps.

The concurring opinion of Justice Douglas, joined by Justice Brennan, should have provided particular guidance to defendant Mitchell and all other attorneys regarding the constitutionality of warrantless domestic national security wiretaps. Justice Douglas observed.

> Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved, they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather, it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner [Katz], I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary and prosecutor and disinterested, neutral magistrate.

389 U.S. at 359-360. The Douglas-Brennan concurrence was in part a response to Justice White's concurrence which suggested that the court "should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." 389 U.S. at 363-64.

Thus, in 1967, the *Katz* majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost the gamble in *Keith*. Today, defendant Mitchell asks that this Court conclude that he acted in good faith merely because there exists a general policy in favor of shielding public officials from unmeritorious lawsuits. *Nixon* v. *Fitzgerald* and *Harlow* v. *Fitzgerald* suggest no such result. Defendant Mitchell's disregard for the rights of those whose privacy was invaded becomes all the more incomprehensible in light of the ease with which the government could have sought a warrant for the Davidon tap. There was no need for instantaneous installation of the tap. As heretofore noted, the District of Columbia was well-supplied with judicial officers who could have been approached concerning the electronic surveillance. If such a neutral and detached magistrate were convinced of the existence of probable cause for electronic surveillance, a warrant could have been issued almost immediately.

Furthermore, had the Attorney General believed that national security considerations required immediate electronic surveillance, he could have installed the wiretap and then sought emergency judicial approval of this action pursuant to 18 U.S.C. § 2518(7) (a portion of Title III of the Omnibus Crime Control and Safe Streets Act of 1968). By following the statutory procedure or first approaching a

magistrate or judge with a warrant request and a request for expedited consideration, defendant Mitchell could have pursued the surveillance he contends was necessary to the nation's security interests in a manner consistent with the clear language of the Fourth Amendment, *Katz*, and 18 U.S. § 2510. This, however, was not done by the Attorney General. Instead, he responded to the request of the FBI for the warrantless wiretap.

Furthermore, the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-20 (effective date June 19, 1968).

Title III provides in relevant part that it shall be unlawful to intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communication unless such interception is permitted pursuant to Title III. (18 U.S.C. § 2511(a)). Section 2516 of Title 18 sets forth the requirements necessary for obtaining authorization to conduct electronic surveillance. Title 18, § 2517 provides the standards which must be met for disclosure and use of intercepted wire or oral communications; 18 U.S.C. § 2518 sets forth a detailed procedure for obtaining and maintaining warrants to conduct electronic surveillance. Title III (18 U.S.C. § 2511) states that "[e]xcept as specifically provided in this chapter" interception of "any wire or oral communication is illegal." As heretofore noted, however, the Justice Department had contended that 18 U.S.C. § 2511(3) exempted national security investigatory wiretaps from Title III. This section, at the time of the surveillance at issue in this case, provided:

> Nothing contained in this chapter [Title III] or in section 605 of the Communications Act of 1934 * * * *shall limit the constitutional power of the President* to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, *or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to*

> *limit the constitutional power of the President* to take such measures as he deems necessary to protect the United States against overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding *only where such interception was reasonable*, and shall not be otherwise used or disclosed except as is necessary to implement that power.

25 U.S.C. § 2511(3) (1970) (emphasis added).

The government's contention that this segment of Title III countermanded Title III's overall proscription of warrantless wiretaping was rejected by the D.C. Circuit in *Zweibon I* and by this Court in its Memorandum of February 14, 1978 (447 F. Supp. 192). A reading of Title III in its entirety buttresses this determination. Sections 2510-20 of Title 18 of the United States Code comprise a Magna Carta for Americans fearful of excessive government and private eavesdropping. The statute requires that electronic surveillance take place only in accordance with the procedures of the Act, procedures set forth in painstaking detail in 18 U.S.C. § 2518. Throughout the Act, unauthorized "bugging" is condemned. Section 2512 prohibits the "manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices." Section 2513 provides that such devices "may be seized and forefeited to the United States." Section 2515 prohibits, unless specifically authorized by Title III, the "use of evidence of intercepted wire and oral communications ... before any court, grand jury, department, officer, agency, regulatory body, legislative committee, ... state, or a political subdivison thereof...." Section 2520 provides a civil cause of action for damages so that those whose communications are unlawfully intercepted may seek redress and so that the possibility of such private suits will deter unlawful electronic surveillance.

The message of Title III is clear: those who would engage in electronic eavesdropping must comply with Title III or

act at their own peril. The language of Section 2511(3) states only a truism—that the statute does not prohibit the President and his authorized representatives from engaging in constitutional acts. As heretofore noted, pp. 13-23, *supra*, is should have been clear to defendant Mitchell that the type of surveillance utilized in this case was unconstitutional. At the very least, the Attorney General should have entertained serious doubts as to whether or not Section 2511(3) created an exception to the requirements of Title III and the clear overall thrust of the statute. Furthermore, the legislative history of Title III demonstrates that the scope of Section 2511(3) was to be determined by the requirements of the Constitution. *See Zweibon I*, 516 F.2d at 663-65.

In light of the statute (18 U.S.C. § 2510-20), its legislative history, and the clear case law interpreting the warrant requirement of the Fourth Amendment, defendant Mitchell's violation of plaintiff's clearly established legal right is apparent. This misunderstanding of the law is all the more surprising coming from the Attorney General, the chief law enforcement officer of the United States. It was incumbent upon the chief law enforcement officer of the United States in 1970 to be aware of the clearly defined Constitutional and statutory limitations on his authority to approve a warrantless wiretap upon the undisputed circumstances in this case.

As the Supreme Court stated in *Harlow* v. *Fitzgerald*, an official who should have expected to know that his conduct would violate constitutional rights "should be made to hesitate." (102 S.Ct. at 2739). This the defendant, despite his position of authority, power, and trust, did not do. Defendant Mitchell, on the basis of this record, is not entitled to qualified immunity under the standards set forth in *Harlow* v. *Fitzgerald*.

This Court is well aware that the vitality of our federal system is bottomed on the Supreme Court's role in interpreting the Constitution as a living document subject to evolving judicial standards. Throughout the nation's history, litigants have sought to have the Supreme Court interpret the Constitution in ways favorable to their desires.

In this case, the Attorney General was apparently persuaded by his subordinates that the nation's security would better be protected by resorting to electronic surveillance without the encumbrance of a warrant. However, as heretofore noted, the Supreme Court had clearly stated more than three years before the installation of the Davidon wiretap that a warrant was required for such electronic surveillance. Undoubtedly, the Attorney General of the United States has a legal right to seek changes in the Supreme Court's interpretation of the Constitution. But this prerogative does not endow him with the right to ignore what the Supreme Court has previously determined to be a requirement of the Constitution. Under our federal system, this Court is required to interpret the Constitution's requirement of a warrant as declared by the Supreme Court in *Katz*.

VI. THE IMMUNITY DEFENSE AND SUMMARY JUDGMENT

According to the standards set forth by the Supreme Court, an official enjoying such good faith immunity must assert this immunity as an affirmative defense, which defendant Mitchell has done in this case. To be immune, the official must have (1) reasonably believed that his actions were not against the law and not have had any reason to know that his actions would violate the law; and (2) not have taken the action with malicious intention to deprive the plaintiff of a federal right. *Wood* v. *Strickland*, 420 U.S. 308, *reh. denied*, 421 U.S. 921 (1975); *Procunier* v. *Navarette*, 434 U.S. 555 (1978). In other words, defendant Mitchell was not "immune from liability if he knew or should have known that the action he took would violate the constitutional rights of the plaintiff, or if he took the action with a malicious intention to cause a deprivation." *Forsyth* v. *Kleindienst*, 599 F.2d at 1211, n.7. The Third Circuit has recently stated that "the qualified immunity defense requires the defendant to prove the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief . . . if the

factual representations are properly controverted, qualified immunity must be established as a defense by evidence presented at trial." *Black* v. *Bayer*, 672 F.2d 309, 316 (3d Cir. 1982) (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974).

In a motion for summary judgment, the moving party has the burden of demonstrating that there is no genuine issue of material fact. *See Ettinger* v. *Johnson*, 556 F.2d 692, 696 (3d Cir. 1977); *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F.2d 817, 824 (3d Cir. 1951). In considering a motion for summary judgment, the Court must view the evidence in a light most favorable to the party opposing the motion. *Goodman* v. *Mead Johnson & Company*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

Where cross-motions for summary judgment have been filed, each must be considered separately by the Court. *Rains v. Cascade Industries, Inc.*, 402 F.2d 241 (3d Cir. 1968); C. Wright and A. Miller, *Federal Practice and Procedure* § 2720 at 460-65. Thus, in this case, each party must, in support of its own motion for summary judgment, establish that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. The Court must consider each party's motion on an individual and separate basis determining, in each case, whether a judgment may be entered in accordance with the standards of Rule 56. Both motions must be denied if the Court finds that there is a genuine issue of material fact. *Rains v. Cascade Industries, Inc.*, *supra*. C. Wright and A. Miller, *supra*.

In this case, the parties contest whether the actions of the Attorney General were done with malice toward Forsyth, Davidon, and other political dissidents opposing the Vietnam war. Plaintiff asserts that electronic surveillance of Davidon, a man who posed no clear and present danger to the national security, indicates malice toward the anti-war movement. Plaintiff further contends that the logs of the recorded conversations indicate that the agents made no attempt to cease overhearing conversations outside the

alleged national security purpose of the tap and that this resulted because defendant Mitchell did not so instruct the agents. Defendants contend that they acted only for legitimate reasons with no malice toward the plaintiff. The parties also disagree as to the reasonableness of defendant Mitchell's conduct in failing to seek Court approval of the electronic surveillance, either before or after the installation of the wiretap.

To be sure, more than mere assertions are required to demonstrate the existence of a genuine issue of material fact. A party opposing summary judgment on the ground that there exists such a dispute must respond to an affidavit with more than general denial (*Tunnell v. Wiley*, 514 F.2d 971 (3d Cir. 1975); *Lesnefsky v. Fischer & Porter Co., Inc.*, 527 F. Supp. 951, 954 (E.D. Pa. 1981). The Court should be particularly cognizant of this principle in evaluating the summary judgment motions of government officials, since public policy considerations favor the resolution of non-meritorious claims against such officials without forcing them to undergo the burdens of trial. *Harlow v. Fitzgerald*, 102 S.Ct 2727 (1982). In *Reese v. Nelson*, 598 F.2d 822 (3d Cir.) *cert. denied*, 444 U.S. 970 (1979) the Third Circuit summarized the relevant considerations in ruling on such motions.

> Although as a general proposition, the question of the qualified immunity of a [public] official is a matter for factual resolution, it is clear, the issue need not always be a jury question. In *Procunier v. Navarette*, the Supreme Court affirmed the entry of a summary judgment on the basis of a qualified immunity.
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> * * *
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> In evaluting the good faith defense, moreover, it need not be necessary to determine whether the defendants' conduct did in fact violate the plaintiff's constitutional rights or whether the procedures utilized by Lancaster County were constitutionally deficient. As *Navarette* makes clear, the immunity defense should not be rejected if at the time that the act was committed there was no clearly established constitutional right *and* there was no malicious intention to de-

> prive the plaintiff of a constitutional right or cause him other injury.

598 F.2d at 826 (citations omitted; emphasis added). *See also Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 712 (3d Cir.) *cert. denied*, 439 U.S. 966 (1978).

Ordinarily, a dispute of fact such as those found in this case would preclude summary judgment. However, the question in this case has become a legal one. The Third Circuit remanded this case so that this Court could determine the scope of defenadant Mitchell's immunity. As heretofore noted, the record in this case makes it clear that the Attorney General was not acting within his prosecutorial role and thus may benefit only from a qualified immunity. To obtain immunity under the traditional test, Mr. Mitchell must show both that (1) he believed his actions were lawful and he had no reason to know that his actions would violate the law *and* (2) he did not act with malicious intent to deprive plaintiff of a constituional right. As heretofore noted, the Court finds that defendant Mitchell engaged in conduct that he, the chief law enforcement officer of the land, could not have reasonably believed to be lawful. The Court determined that defendant Mitchell should have known that the surveillance at issue in this case required a warrant. Thus, defendant Mitchell has failed to satisfy the first prong of the two-part criteria for qualified immunity as set forth in *Wood v. Strickland* and *Procunier v. Navarette*.

Harlow v. Fitzgerald has further refined traditional qualified immunity analysis and underscores the futility of a trial in this case for the purpose of determining the good faith immunity of the Attorney General *Harlow* represented "an adjustment of the 'good faith' standard established by [prior Supreme Court] decisions." 102 S.Ct. at 2737. As Justice Powell observed in *Harlow*,

> Decision of this Court have established that the 'good faith' defense has both an 'objective' and a 'subjective' aspect. The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.' [citing Wood v. Strickland]. The subjective component refers to 'permissible intentions.' ... Referring both to the objective and subjective elements, we have held that qualified immunity

> would be defeated if an official *'knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] *or* if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury...." [quoting Wood v. Strickland].

102 S.Ct. at 2737. (citations omitted; emphasis the Court's). The *Harlow* Court then discussed a significant problem with subjective aspects of the test—its tendency to require government officials to defend unmeritorious suits. The Court's adjustment was to direct the federal courts to first make the objective inquiry into the state of the law and determine whether the defendant's conduct violated a clearly established Constitutional right. If the defendant has deprived plaintiff of a clearly established constitutional right, absence of malice would not relieve the defendant of liability, since the defendant violated a clearly established constitutional right.

Said the *Harlow* Court:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred.
>
> If the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct. [T]he defense would turn primarily on objective factors.
>
> * * *
>
> [This] test focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

102 S.Ct. at 2739. *See also Saunders v. Parole Agents*, Civil Action No. 81-930 (E.D. Pa. Sept. 30, 1982) (Luongo, Ch.J.); *Druckenmiller v. United States*, Civil Action No. 82-0970 (E.D. Pa. Oct. 1, 1982) (Troutman, J.).

The mandate of *Harlow* is clear. This Court must interpret the objective law and determine whether defendant Mitchell's conduct violated a clearly established legal right. As heretofore noted, this Court, upon reviewing the decisions of the Supreme Court, has found that in 1970 plaintiff's right to be free of warrantless electronic surveillance, even surveillance conducted pursuant to a national security investigation, was clearly established. Defendant Mitchell, the Attorney General of the United States, should have known that his conduct violated this clearly established legal right and should have refrained from authorizing the wiretap. Thus, according to the objective standard for qualified immunity set forth in *Harlow*, defendant Mitchell is not entitled to the limited immunity of good faith.

In other instances, the question of the reasonableness of a government official's action might require findings of fact by the Court or a jury. In this case, however, the question of reasonableness is a legal question that must be answered by legal research rather than the taking and weighing of testimony. It would be ludicrous to permit a jury or laymen to hear "evidence" about the legal doctrines surrounding the Fourth Amendment and then instruct them that they as laymen are to determine whether the Attorney General's construction of the law was reasonable. The Supreme Court implictly recognized this in *Harlow*. Furthermore, the Court having before it cross-motions for summary judgment, has determined on the basis of the record as it now stands that there is no genuine issue of material fact as to liability. As heretofore pointed out, the Attorney General, in his own deposition, has clearly stated that the warrantless wiretap which he authorized was solely for the purpose of investigating a national security matter and was not intended to obtain evidence necessary for a criminal prosecution.

The Court recognizes that in certain instances a legal defense may require fact-finding for its evaluation. For example, the Supreme Court has enunciated the following narrow exceptions to the warrant requirement of the Fourth Amendment. These are: where the search is incident to a lawful arrest (*Warden v. Hayden*, 387 U.S. 294, 299

(1967)); where the failure to act immediately (even though without a warrant) would endanger the lives of law enforcement personnel or others (*Id.* at 299); where the objects sought in the search are likely to disappear if a warrantless search is not immediately conducted, (*Carroll v. United States*, 267 U.S. 132, 152-54 (1925); *Cooper v. California*, 386 U.S. 58, 59 (1967); *Brinegar v. United States*, 338 U.S. 160, 176-78 (1947)); where law enforcement officers respond to a sudden and unanticipated emergency (*McDonald v. United States*, 335 U.S. 451, 455 (1948); or where a suspect is in flight (*Id.* at 455). These were the few "well-delineated exceptions" to the warrant requirement which the Supreme Court referred to in *Katz v. United States, supra*, 389 U.S. at 357, n.19. A case presenting one of these exceptions might require a trial concerning question of fact. However, defendant Mitchell's defense in this case, although both legal and factual, does not involve a factual dispute. As heretofore noted, defendant Mitchell has maintained throughout this litigation that he approved the warrantless wiretap pursuant to a national security investigation.

Whether plaintiff is entitled to punitive damages and the amount of any such damages is a matter of federal common law. *Bacista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965). Federal common law permits recovery of punitive or exemplary damages where the plaintiff has shown a violation of his civil rights (*Id.* at 87) even if he does not receive an award of compensatory damages (*Cochetti v. Desmond*, 572 F.2d 102, 105 (3d Cir. 1978); *Fisher v. Volz*, 496 F.2d 333, 347-48 (3d Cir. 1974), provided that plaintiff can demonstrate that the defendant "acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so. . . ." *Cochetti v. Desmond, supra*, 572 F.2d at 106. *See also Scott v. Plante*, 641 F.2d 117, 135 (3d Cir. 1981); *Fisher v. Volz, supra*, 496 F.2d at 347. The Court will therefore set a hearing to determine whether the plaintiff is entitled to punitive damages and/or compensatory damages.

As heretofore noted, this case was remanded to this Court by the Third Circuit to determine whether Attorney General Mitchell is entitled to the absolute immunity of a

prosecutor or a qualified immunity. (599 F.2d at 1217). The Third Circuit did not disturb this Court's earlier ruling that there existed genuine issues of material fact which precluded the granting of either motion for summary judgment concerning defendant FBI agents Albert Cooper and David Porter, who conducted the wiretap at issue in this case. (Memorandum of February 14, 1978, 447 F. Supp. 192). Since remand, the parties have not presented any additional facts either by affidavits, answers to interrogatories, or depositions, nor have they presented any reason for the Court to reconsider its earlier ruling concerning the FBI agents. In particular, the parties have not discussed the applicability of *Harlow* to the FBI agents. However, since *Harlow's* holding appears to be limited to "government officials performing discretionary functions" (102 S.Ct. at 2738), it may be that *Harlow* does not alter the two-prong immunity test of *Wood v. Strickland* traditionally applied to FBI agents engaged in ministerial, non-policy-making functions.

It may be that the agents can establish by a preponderance of the evidence that they acted in good faith, on reliance of the Attorney General's authorization of the wiretap, and could thus satisfy the first prong of the two-pronged test for qualified immunity set forth in *Wood v. Strickland* and its progeny.

In any event, here are genuine issues of material fact concerning the conduct of the FBI agents in proceeding with the wiretap and whether they acted with malice, particularly in light of the plaintiff's claim that they failed to minimize the interception and recording of the plaintiff's conversations concerning his political activities. Therefore, trial is required not only on the question of damages, but on the question of liability as to defendants Cooper and Porter.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action
No. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, ET. AL.

ORDER

AND NOW, this 12th day of November, 1982, upon consideration of the parties' cross-motions for summary judgment and the parties' respective responses thereto, for the reasons set forth in this Court's Memorandum of November 12, 1982.

IT IS HEREBY ORDERED:

1. Plaintiff Keith Forsyth's motion for summary judgment as to the liability only of defendant John Mitchell is GRANTED;

2. Defendants motion for summary judgment is DENIED;

3. Trial will be held on December 15, 1982 for the purpose of determining the liability of defendants Albert Cooper and David Porter, the FBI agents who conducted the electronic surveillance at issue in this case, and for the purpose of determining damages suffered by plaintiff Keith Forsyth.

/s/ R.J. Broderick, J.

RAYMOND J. BRODERICK, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1812

KEITH FROSYTH

v.

RICHARD G. KLEINDIENST,
individually and as Attorney General of the
United States, L. Patrick Gray, 3rd, individually
and as Acting Director,
Federal Bureau of Investigation,
JOHN N. MITCHELL, individually and as former
Attorney General of the United States,
JOHN DOE and ALBERT COOPER and DAVID PORTER

JOHN N. MITCHELL, ALBERT COOPER, AND
DAVID PORTER, APPELLANTS

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil No. 72-1920)

No. 83-3150

KEITH FORSYTH, PLAINTIFF-RESPONDENT

HON. RAYMOND J. BRODERICK,
United States District Judge,
NOMINAL RESPONDENT

v.

JOHN N. MITCHELL, DEFENDANT-PETITIONER

ON PETITION FOR WRIT OF MANDAMUS

Present: WEIS, HIGGINBOTHAM AND SLOVITER, *Circuit Judges*

JUDGMENT

These causes came to be heard on the record from the United States District Court for the District of Pennsylvania, were consolidated for disposition, and were argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 12, 1982, be and the same is hereby affirmed with respect to the denial of absolute immunity and dismissed with respect to the denial of qualified immunity.

It is further ordered and adjudged by this Court that the petition for writ of mandamus be, and the same is hereby denied.

Costs taxed against appellants in No. 82-1812 and petitioner in No. 83-3150.

ATTEST:

/s/ Sally Mvros

Clerk

March 8, 1984

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1812

KEITH FORSYTH, APPELLEE

v.

RICHARD G. KLEINDIENST, ET AL., DEFENDANTS,
JOHN N. MITCHELL, APPELLANT.

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Civil No. 72-1920)

No. 83-3150

KEITH FORSYTH, PLAINTIFF-RESPONDENT

HON. RAYMOND J. BRODERICK,
United States District Judge,
NOMINAL RESPONDENT

v.

JOHN N. MITCHELL, DEFENDANT-PETITIONER

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by John N. Mitchell Appellant-Petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Adams would grant rehearing in banc because he believes the issues raised by the appeal are of sufficient importance to command the attention of the full court. Judge Hunter, Judge Weis and Judge Garth would grant the petition for rehearing.

By the Court,

/s/

Circuit Judge

Dated: April 3, 1984

APPENDIX G

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 78-1611, 78-1847

KEITH FORSYTH, APPELLEE

v.

RICHARD G. KLEINDIENST, Individually and as Attorney General of the United States, L. PATRICK GRAY, 3rd, Individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE, ALBERT COOPER and DAVID PORTER.

APPEAL OF JOHN N. MITCHELL, E. DAVIS PORTER, and ALBERT COOPER

KATHERINE W. BURKHART, JUDITH CHOMSKY, EVA GOLD, DINA PORTNOY, CANDY PUTTER, JOSHUA (JOSH) MARKEL, APPELLEES

v.

WILLIAM SAXBE, Individually and as Attorney General of the United States, CLARENCE KELLEY, Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE, and RICHARD ROE

APPEAL OF JOHN N. MITCHELL, CLARENCE KELLEY, and WILLIAM SAXBE

Argued Feb. 23, 1979

Decided May 22, 1979

Before HUNTER and WEIS, Circuit Judges, and MARKEY, Chief Judge, Court of Customs and Patent Appeals.*

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This appeal is a consolidation of two related actions before different district court judges in the Eastern District of Pennsylvania.[1] The actions involve identical issues, virtually identical defendants and have overlapping records. The defendants, former Attorneys General of the United States, a former Director of the Federal Bureau of Investigation, and agents of the Federal Bureau of Investigation, appeal from the denial of their motions for summary judgment. First, the defendants contend that both district courts erred in holding that the defendants are not entitled to absolute immunity. Alternatively, the defendants contend that the district courts erred in not granting them qualified immunity as a matter of law.

We conclude that the district court's denials of defendants' motions for summary judgment on the issue of absolute immunity are appealable at this time under the collateral order doctrine. Both *Forsyth* and

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

[1] *Forsyth* v. *Kleindienst* is reported at 447 F.Supp. 192 (E.D.Pa. 1978). *Burkhart* v. *Saxbe* is found at 448 F.Supp. 588 (E.D.Pa. 1978).

Burkhart will be remanded to the respective district court to apply the test developed in this opinion to the facts of each case. On the defendants' contention that they are, in any event, entitled to qualified immunity as a matter of law, we hold that the denial of the motion for summary judgment on this issue is not a final judgment and is, therefore, not appealable at this time. Finally, we reject the individual FBI agents' contention that they are entitled to derivative absolute immunity.

I.

These cases arise out of warrantless electronic surveillances authorized by the Attorney General and executed by FBI agents in the early 1970's. The wiretaps resulted in the overhearing of telephone conversations between the plaintiffs and members of organizations under investigation. The plaintiffs were not themselves under investigation.

Forsyth

Plaintiff Keith Forsyth was overheard through a tap directed against William Davidon, a professor at Haverford College, who was allegedly associated with the East Coast Conspiracy to Save Lives (ECCSL). The Philadelphia FBI office learned in June, 1970 that the ECCSL was planning to protest the Vietnam War by destroying underground utility tunnels in Washington, D.C. The FBI also had information that the ECCSL had been responsible for several raids on draft board offices. In August, 1970 the government

obtained copies of letters written by Father Phillip Berrigan and Sister Elizabeth McAlister which indicated that three people, including Professor Davidon, had discussed the possibility of kidnapping National Security Advisor Henry Kissinger. On November 6, 1970, after additional investigation, Attorney General John Mitchell authorized the FBI to place a wiretap on the telephone of Professor Davidon. The tap continued with one extension until January 6, 1971. According to FBI Special Agent Fields, the purpose of the tap was primarily to gather intelligence information, although it was anticipated that information of a criminal evidentiary nature might also be obtained. The monitoring agents were instructed to record all conversations unless it was known that one of the parties to the conversation was a defendant in a federal criminal case or was an attorney for a criminal defendant. No other instructions were given to minimize the scope of the interceptions. Forsyth was overheard on three occasions.

Forsyth sued for damages under the first, fourth, sixth, and ninth amendments to the Constitution, and under 18 U.S.C. § 2520 (1976).[2] After discovery, in-

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[2] Section 2520 of Title 18 (1976) provides a private cause of action and damages for violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wire Interception and Interception of Oral Communications). 18 U.S.C. §§ 2510-2520 (1976). It provides:

> Recovery of civil damages authorized
>
> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person

cluding the deposing of defendant Mitchell, both sides moved for summary judgment. On February 14, 1978 the district court denied the motions for summary judgment. First, the court held that the defendants were not entitled to absolute immunity. Second, it held that there was a genuine dispute over material facts which precluded summary judgment on the issue of qualified immunity. *See* Fed.R.Civ.P. 56 (c).

Burkhart

Plaintiffs in *Burkhart* were overheard on both the Davidon tap and a tap directed against the Black Panther Party. The Black Panther tap was originally authorized on June 1, 1970 and continued until February 10, 1971. Two reauthorizations in the interim were required because phone service to the Black Panther party headquarters was terminated and the headquarters moved to a new location. Attorney General Mitchell stated in an affidavit that he

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who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recovery from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

authorized the Black Panther tap because he had information that the Party had made foreign "contacts . . . for the purpose of obtaining foreign funds to support Black Panther revolutionary activities, including the advocacy of the violent overthrow of existent Federal and state government structures."

Plaintiffs in *Burkhart* also sued for damages for violations of their rights under the first, fourth, sixth, and ninth amendments to the Constitution, and under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *See* note 2 *supra*. The district court first denied the defendants' claims of absolute immunity in July, 1975. *Burkhart* v. *Saxbe*, 397 F.Supp. 499 (E.D.Pa. 1975). Later cross motions for summary judgment were filed, and argument was heard jointly with that in *Forsyth*. The district court denied both sides' motions for summary judgment on March 21, 1978. As in *Forsyth*, the *Burkhart* court found material questions of fact in dispute which precluded summary judgment on the issue of qualified immunity. Also, it refused to reverse its earlier decision denying the defendants' motion to dismiss on the issue of absolute immunity.

Plaintiffs in both actions rely on *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), (*Keith*), to establish a violation of their fourth amendment rights. There, the Supreme Court held that the fourth amendment requires that a warrant be obtained before engaging in surveillance of a domestic organization, even if the domestic organization threatens national security. In

the context of this case, we have no occasion to review the district courts' holdings that the wiretaps authorized here were unconstitutional under *District Court*. Nor will we address the district courts' holdings that *District Court* is to be given retroactive effect. The sole issue before us is whether the defendants are entitled to absolute immunity.

II.

Initially, we are presented with the plaintiffs' contention that we lack appellate jurisdiction to review the district courts' denials of defendants' motions for summary judgment. Generally, the denial of a motion for summary judgment is not appealable. *Hart* v. *Overseas National Airways, Inc.*, 541 F.2d 386, 394 (3d Cir. 1976). Nevertheless, defendants contend that we have appellate jurisdiction under the final judgment rule, 28 U.S.C. § 1291 (1976).[3] As early as 1949 the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949), emphasized that section 1291 must be given a "practical rather than a technical construction." Under the *Cohen* collateral order doctrine, appellate courts have jurisdiction over orders which "finally determine claims of right separable from, and collateral to, rights as-

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[3] Section 1291 of Title 28 (1976) provides in part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

serted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225-1226. The Supreme Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), summarized the three requirements of *Cohen*.[4] To be appealable a district court's order must 1) conclusively determine the disputed question; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. *Id.* at 468-69, 98 S.Ct. 2454. *See also United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (district court's order denying motion to dismiss indictment because of alleged violation of sixth amendment rights to speedy trial not appealable before trial).

The district courts' denials of the defendants' motions for summary judgment on absolute immunity must be analyzed under these three standards. *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), is closely analogous to our case. There, the Supreme Court addressed the question of whether a pretrial order denying defendants' motion to dismiss on the ground of double jeopardy is a final order under section 1291. In finding appeal-

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[4] In *Livesay* the Court applied the *Cohen* collateral order doctrine to determine that the denial of a motion for class certification is not appealable under 28 U.S.C. § 1291 before trial.

ability, the Court stressed particularly the third of the three *Cohen* factors—that the district court's decision involved an important right which would be lost if appellate review had to await adjudication on the merits. And, in characterizing the right which the defendant would lose absent immediate review, the Court noted: "[The defendant] is contesting the very authority of the Government to hale him into court to face trial on the charge against him. . . The elements of that claim are completely independent of his guilt or innocence." *Id.* at 659-60, 97 S.Ct. at 2040.

We agree with the defendants' argument that the rights protected by the double jeopardy clause and the doctrine of absolute immunity are similar. The underlying purpose of each is to grant the defendant the right not to be subjected to trial, not just the right not to be found guilty. A case quite similar to that before us is *Briggs* v. *Goodwin*, 186 U.S.App. D.C. 179, 569 F.2d 10 (1977) (Wilkey, J. writing for the majority on the issue of appealability), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978). There, the court considered the appealability of the denial of a defendant's motion to dismiss because he was, as a witness in a criminal proceeding, absolutely immune from prosecution under the doctrine of quasi-judicial immunity. In finding appellate jurisdiction the court, also stressing the third of the three *Cohen* criteria, noted that the purpose of absolute immunity is "as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial." *Id.* at 59. The court

interpreted *Abney* as formulating the following test: "whether the relevant rights that were the subject of the pretrial order would be 'significantly undermined' if appellate review had to await final action in the case." *Id. See also McSurely* v. *McClellan*, 172 U.S. App.D.C. 364, 521 F.2d 1024, 1032 (1975), *en banc*, 180 U.S.App.D.C. 101, 553 F.2d 1277 (1976), *cert. dismissed as improvidently granted*, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978) (on appeal from denial of motion to dismiss for absolute immunity under the Speech & Debate Clause, "the question of appealability does not turn on the correctness of an appellant's claim[s]").

Furthermore, defendants here are not precluded from relying on the collateral order doctrine merely because they were unsuccessful in their attempts to have the question of absolute immunity certified under 28 U.S.C. § 1292(b) (1976).[5] A section 1292(b) motion was filed in each action: the motion was denied in *Burkhart* and was not ruled upon in *Forsyth*. Simply stated, the collateral order doctrine and sec-

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[5] Section 1292(b) of Title 28 (1976) provides in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

tion 1292(b) serve different goals. Section 1292(b) permits the district court to certify an order to the appellate court if the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Thus, institutional efficiency is a major purpose of the certification provision. *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) (used in exceptional cases where an intermediate appeal would avoid protracted and expensive litigation). *Accord, Kraus* v. *Board of County Road Commisioners for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966) (purpose to avoid protracted and expensive litigation); *E. F. Hutton & Co.* v. *Brown*, 305 F.Supp. 371, 402-03 (D.C.Tex.1969) (purpose to shorten time, effort, and expense exhausted between filing of lawsuit and its termination). A central goal of the collateral order doctrine, however, is to prevent the loss of rights merely because appellate review is delayed until the litigation has run its full course in the lower court. As noted in *Briggs*, "[s]ince the discretion of the trial judge whether to certify is itself unreviewable, the value of immediate review in the 'small class' of cases where it is warranted under the collateral order doctrine could be irretrievably lost if [the] view that denial of certification *per se* bars interlocutory review were to prevail." 569 F.2d at 60.

We hold that the denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen* collateral order doctrine. Appellate review at this time will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits. *See McSurely* v. *McClellan*, 172 U.S. App.D.C. 364, 521 F.2d 1024 (1975), *en banc*, 180 U.S.App.D.C. 101, 553 F.2d 1277 (1976), *cert. dismissed*, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978).

Finally, we reject the defendants' suggestion that we take this opportunity to review the district courts' denials of their motions for summary judgment on the issue of qualified immunity. The Supreme Court in *Abney*, while upholding appellate jurisdiction over the double jeopardy claim, concluded that an appellate court lacked jurisdiction over the defendant's accompanying contention that the district court erred in refusing to dismiss the indictment for failure to state an offense. The Court held that "such claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule." 431 U.S. at 663, 97 S.Ct. at 2042. Though the defendants may ultimately prevail on

the issue of qualified immunity, they do not seriously contend that the denials of their motions for summary judgment on that issue are appealable under the three requirements of *Cohen*.

III

We are presented, then, with the defendants' contention that they are entitled to absolute immunity. We recognize, as did the defendants, that the availability of absolute immunity to the individual agents who executed the surveillances may rest on different considerations from those urged by former Attorney General Mitchell.[6] Thus, we analyze the two problems separately.

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[6] We have omitted from our discussion any mention of the defendants who were high level federal officials other than former Attorney General Mitchell. In *Forsyth* the district court dismissed the claims against defendants former Attorney General Richard G. Kleindienst and former Director of the FBI L. Patrick Gray. Plaintiffs have not challenged the dismissal.

In *Burkhart* two of the defendants, former Attorney General William Saxbe and former Director of the FBI Clarence Kelley, have apparently not been formally dismissed. However, neither Saxbe nor Kelley was in office at the time the surveillances occurred. *Burkhart* noted that there is no basis for holding them liable for violating the fourth amendment rights of the plaintiffs. Plaintiffs are left only with a claim against Saxbe and Kelley for illegal use or disclosure of the taped material, an offense arising under 18 U.S.C. § 2520. *See* note 2 *supra*. On these issues, the district court stated: "Defendants, Saxbe and Kelley, having taken office subsequent to the termination of the wiretaps in question and there being no support on the record for plaintiffs' allegations of use and disclosure, I see no basis for holding

Former Attorney General Mitchell contends that he is absolutely immune from civil liability for his decision to authorize the warrantless electronic surveillances. As the head of an executive agency, the Department of Justice, he argues that he should not be held liable for what he characterizes as an error in judgment. His argument stresses that the wiretaps which gave rise to these suits occurred in 1970 and 1971, but that the Supreme Court did not definitely decide until 1972 that the warrantless electronic surveillance of domestic organizations violated the fourth amendment. *See United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). He argues that his only error was a failure to predict accurately what the Supreme Court would later hold. Also, he directs us to the possibility of harassing lawsuits which he contends would hamper the effective discharge of the duties of the Attorney General if we were to hold that he is not entitled to absolute immunity.

The Supreme Court considered the scope of immunity for the heads of federal executive agencies in *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). There, Economou brought suit against a number of officials in the Department of Agriculture. The corporation which the plaintiff controlled, Arthur N. Economou and Co., had been registered with the Department of Agriculture as a

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these defendants liable." 448 F.Supp. at 607 (footnote omitted). Because of their uncertain status, we do not discuss them individually. We note, however, that the principles developed by this opinion would apply equally to them.

commodity futures commission merchant. The Department sought to revoke the registration, contending that the plaintiff had failed to maintain the required financial reserve. A hearing was held, and the Chief Hearing Examiner sustained the administrative complaint. His decision was affirmed by the Department's Judicial Officer. Economou contended that the administrative proceeding had been initiated in retaliation for his sharp criticism of the Commodity Exchange Authority. He sought damages against several officials in the Department of Agriculture—including the Secretary, the Judicial Officer, the Chief Hearing Examiner, and the Department attorney who had presented the Department's objections—for violations of his due process and first amendment rights. The district court granted the defendants' motion to dismiss on the ground of absolute immunity, and the Second Circuit reversed, reasoning that *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), established that officials of the executive branch exercising discretionary functions would be adequately protected by only a qualified immunity.

The Supreme Court reversed. While remanding for further proceedings, the Court held that the Secretary, and the other Agriculture Department officials involved in the administrative proceeding, might be entitled to absolute immunity from suit. The Court first distinguished *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and in the process, cut much of the force out of the Attorney General's argument here. The defendant in *Barr*, the

acting director of an executive agency, claimed absolute immunity from a malicious defamation suit brought by two former employees. The Supreme Court's plurality opinion held that the official was absolutely immune since the issuance of the defamatory press release was "within the outer perimeter of [the defendant's] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." 360 U.S. at 575, 79 S.Ct. at 1341. The Court succinctly stated its rationale for granting absolute immunity:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties —suits which would consume time and energies which would otherwise be devoted to government service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id. at 571, 79 S.Ct. at 1339. In balancing the deprivation to the individual denied a remedy against the interest of governmental efficiency, the Court recognized that "there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good." *Id.* at 576, 79 S.Ct. at 1342.

The plaintiffs in *Barr* alleged defamation, a cause of action arising under state tort law; in *Butz*, the Court was presented with allegations of constitutional deprivations. This distinction, in the Supreme Court's view, was crucial:

> [W]e are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness embodied in the Constitution. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

98 S.Ct. at 2905 (footnote omitted). Thus, the considerations central to the result in *Barr*—the need to protect an official exercising his discretion and the need to limit harassing suits which would impair the vigorous discharge of his duties—are insufficient to justify the grant of absolute immunity to high officials of executive agencies when violations of federal constitutional law, as opposed to state tort law, are asserted.

Having distinguished *Barr* v. *Matteo*, the Supreme Court looked to *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), to supply the governing legal principles. There it had confronted the scope of immunity available to a state governor sued under 42 U.S.C. § 1983 for suppressing a civil disturbance in an unconstitutional manner. *Butz* characterized *Scheuer* as resolving the problem of "how best to reconcile the plaintiff's right to compensation with the need to protect the decision making processes of an executive department." The result of the balance in *Scheuer* was to grant the state

governor only a qualified, or good faith, immunity from suit.[7] *Butz* extended *Scheuer* to provide the general rule for federal officials as well.[8]

Butz and *Scheuer* undermine the Attornel General's policy arguments here. First, he contends that his prediction that warrantless electronic surveillance would not be held to violate the fourth amendment was essentially a discretionary act for which he should not be held liable. We have noted, however, that *Barr's* holding that federal officials exercising discretionary functions are absolutely immune from suit under state tort law does not apply in the face of allegations of constitutional deprivations. The *Butz* Court balanced the competing considerations: "*Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or

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[7] The Supreme Court defined "good faith" for the purposes of establishing qualified immunity from a suit based on § 1983 in *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The Court held that an official would not be immune from liability if he knew or should have known that the action he took would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation. *Id.* at 322, 95 S.Ct. 992.

[8] The *Butz* Court reasoned:

> The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do state officers.

98 S.Ct. at 2908 (emphasis in original).

should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 98 S.Ct. at 2911. More fundamentally, the Attorney General's justification that the law was unsettled when he authorized the warrantless surveillance does not distinguish between absolute and qualified immunity. If he can establish that the law was unsettled, and that he acted without malice, he will prevail on his claim of qualified immunity. *See Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). *See also* note 7 *supra*. As we have stressed, the question before us is not ultimate liability; rather it is whether the Attorney General should be protected even from the burden of defending himself at trial.

Second, the Attorney General contends that he is entitled to absolute immunity because a lesser level of protection would permit an Attorney General to be subject to frivolous, harassing lawsuits which would chill the vigorous discharge of his duties. *Butz*, however, was unconcerned with this problem. The Court noted that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 98 S.Ct. at 2911.

IV.

The Supreme Court in *Butz* held that "in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 98 S.Ct. at 2911. We read the holding as placing a heavy burden on the defendants to demonstrate a need for protection greater than that provided by qualified immunity.[9] As our starting point we must undertake "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.*, *quoting Imbler* v. *Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976).

In *Imbler* the Supreme Court granted absolute immunity to a state prosecutor from a suit under 42 U.S.C. § 1983 charging him with the knowing use of perjured testimony. The plaintiff contended that the state prosecutor could not, as a member of the executive branch, claim quasi-judicial absolute

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[9] The Court in *Butz* noted:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: . . . In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

98 S.Ct. at 2910-2911.

immunity. The Supreme Court rejected the plaintiff's argument. It stated that its earlier decisions on section 1983 immunities did not rest solely on the branch of government in which the defendant worked. 424 U.S. at 421, 96 S.Ct. 894. After determining that a prosecutor was entitled at common law to absolute immunity from suit, the Court examined the common law rule in light of section 1983. In upholding the grant of absolute immunity, it noted that a state prosecutor would be particularly unable to defend himself from a potential flood of section 1983 suits; that the ultimate fairness of the criminal justice system might be upset by subjecting prosecutors to suit; and that the inherent independence of the judicial system provides procedures to check excessive prosecutorial zeal and determine whether the accused has received a fair trial. 424 U.S. at 425-28, 96 S.Ct. 894.

The Attorney General here relies on *Imbler*. He analogizes his position to that of a state prosecuting attorney, and argues that because their positions are similar, he too should be entitled to the shield of absolute immunity. The Attorney General's claim to absolute immunity, therefore, is measured by that extended to the state prosecutor in *Imbler*. We search, then, for the boundaries to that immunity.

At the outset, the Attorney General cannot effectively contend that his functions are coextensive with those of a prosecuting attorney. Though as a shorthand expression he has been called the nation's "chief prosecuting attorney," his duties and responsibilities are far greater than those of the ordinary prosecu-

tor.[10] The distinction is important because the Supreme Court in *Butz* and *Imbler* intended a functional test rather than one based on status or title.[11] *Butz* particularly stressed the need to make an inquiry into the particular decision challenged to determine whether an official is entitled to absolute immunity. There, the Secretary of Agriculture had the statutory power to initiate proceedings whenever he had reason to believe that a person had violated the statute or the rules, regulations, or orders of the Secretary of Agriculture or the Commission. 7 U.S.C. § 9.[12] The Court noted that "[t]he decision to initiate

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[10] For example, the Attorney General is charged with the duty of giving legal advice to the President, 28 U.S.C. § 511 (1976); to the heads of other executive departments, *id.* at § 512; and to the Secretaries of military departments, *id.* at § 513. His purely administrative duties range from providing for the publication and distribution of his opinions, *id.* at § 521, to appropriating money for the meals and lodging of bailiffs, *id.* at § 524. Moreover, the Federal Bureau of Investigation is within the Department of Justice, *id.* at § 531. And, the Attorney General has the power to appoint officials to detect and prosecute crimes against the United States and to conduct other investigations regarding official matters under the control of the Department of Justice, *id.* at § 533.

[11] The Eighth Circuit in *Tigue* v. *Swaim*, 585 F.2d 909 (8th Cir. 1978), similarly read *Butz* as demanding a functional approach: "*Butz* demands a particularized inquiry into the functions an official performs and the circumstances under which they are performed prior to the granting of absolute immunity," not merely an inquiry into the status or title of the official claiming the protection.

[12] The statute has since been amended to provide that the Commission, and not the Secretary, has the power to initiate proceedings. 7 U.S.C. § 9, *as amended by* Act of Oct. 23, 1974, Pub.L.No. 93-463, 88 Stat. 1392.

administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." 98 S.Ct. at 2915. In granting the Secretary absolute immunity over the decision to institute administrative proceedings, the Court held: "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity *with respect to such acts*." *Id.* (emphasis supplied)[18]

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[18] The Attorney General urges that an important factor in the *Butz* decision to grant absolute immunity against a suit challenging a decision by the Secretary to initiate the administrative proceeding was the existence of checks, other than private damages actions, on the Secretary's conduct. Thus, in *Butz* the Court stressed that "legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal." 98 S.Ct. at 2916. More generally, "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." 98 S.Ct. at 2914. The Attorney General argues that there are sufficient checks on his decision to authorize warrantless electronic wiretaps that he, too, should be immune from private remedy. He points out that the Attorney General is an officer of the court, subject to professional discipline, and that Congress has the power to overturn his judicial interpretations.

We are not necessarily persuaded by the Attorney General's argument. The checks to which he directs our attention are not analogous to the multitude of independent checks and safeguards operating inherently, without the need of special invocation, in the judicial system. It is because of the "features of the judicial process" that "there is a less pressing need for individual suits to correct constitutional error." *Butz*, 98 S.Ct. at 2914. The plaintiffs here were not the sub-

Imbler v. *Pachtman*, as well, utilized a functional approach. It suggested that even a prosecuting attorney would not be absolutely immune from suit for actions which are not closely connected with the judicial process. The Supreme Court's holding was narrow: "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." 424 U.S. at 431, 96 S.Ct. at 995. The Court emphasized that the prosecutor's activities "were intimately associated with the judicial phase of the criminal process," and therefore, were "functions to which the reasons for absolute immunity apply with full force." *Id.* at 430, 96 S.Ct. at 995. While leaving open the question of whether a prosecutor is entitled to absolute immunity for other actions, Justice Powell made the following comments:

> We recognize that the duties of the prosecutor in his role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. . . . These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial,

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jects of criminal investigations. If they are denied an opportunity to present their case by the doctrine of absolute immunity the defendants' allegedly unconstitutional conduct may never be subject to judicial scrutiny in any forum.

> may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33.

Cases in other circuits both before and after *Imbler* have distinguished between a prosecutor's quasi-judicial functions on the one hand and his investigative and administrative functions on the other, granting absolute immunity to the former and relegating the latter to qualified immunity. In *Apton* v. *Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974), plaintiffs contended that the Attorney General, other high ranking Department of Justice officials, and members of the District of Columbia Police Department violated their fourth amendment rights. Specifically, plaintiffs complained that they were detained without probable cause during the May Day demonstrations in 1971. The D.C. Circuit held that the Attorney General was not entitled to absolute immunity for his part in directing the May Day police activity. The Court reasoned that "the absolute immunity often accorded prosecuting attorneys cannot shield the defendants in this case, for the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse." *Id.* at 93 (footnotes omitted). The court

held that in the course of directing police investigative activity, the Attorney General would not be entitled to absolute immunity. *See Guerro* v. *Mulhearn*, 498 F.2d 1249 (1st Cir. 1974) (absolute immunity does not relate to acts done in the prosecutor's investigatory role); *Hampton* v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974) (states attorney not absolutely immune for planning and executing illegal raid); *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972); *Dodd* v. *Spokane County, Washington*, 393 F.2d 330, 335 (9th Cir. 1968). *See also Jennings* v. *Shuman*, 567 F.2d 1213, 1221 & n. 15 (3d Cir. 1977), which questions the correctness of the scope of immunity afforded in *Briggs* v. *Goodwin*, 186 U.S.App.D.C. 179, 569 F.2d 10, 19-20 (1977), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978).

This court has not been squarely presented with the problem of the scope of immunity for prosecutorial conduct which lies outside of the advocatory function but within a prosecutor's duties as an administrator or investigator. In *Brawer* v. *Horowitz*, 535 F.2d 830 (3d Cir. 1976), we were confronted with plaintiff's contentions that a federal prosecutor had knowingly used perjured testimony. We held: "[A] federal prosecutor is absolutely immune from suit where the allegations relate solely to his initiating and presenting a criminal case. The allegations of the complaint implicating [the defendant-federal prosecutor] all related to his actions in his role as

an advocate, rather than as an administrator or investigator." *Id.* at 834, *citing Imbler* v. *Pachtman*, 424 U.S. at 431 & n. 33, 96 S.Ct. 984. In *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977), this court in a per curiam opinion considered the immunity available to a federal prosecutor against a suit alleging that he deliberately leaked false information about the plaintiff to damage the plaintiff's political prospects. While finding it unnecessary to decide whether absolute immunity protects a U.S. Attorney's administrative and investigative functions, we held that for some conduct a prosecutor may only be entitled to only qualified immunity: "It would appear that [the deliberate leaking of false information], if it occurred would lie outside of the rationale for absolute immunity set forth in *Imbler*." *Id.* at 566.

Thus, the advocatory/investigative distinction has been cited with approval in this court.[14] We hold that

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[14] Defendants contend that this court rejected the advocatory/investigative distinction in *Cambist Films, Inc.* v. *Duggan*, 475 F.2d 887 (3d Cir. 1973). There, a state prosecuting attorney was sued for his actions in investigating a violation of the laws of Pennsylvania. The court, granting the prosecutor absolute immunity, held: "Obviously, this case in no way approaches the 'clear absence of jurisdiction' standard required for possible liability on the part of the prosecutor." *Id.* at 889. We distinguish *Cambist* on two grounds. First, *Cambist* involved a common law tort action. Any statement on the scope of immunity from allegations of constitutional deprivations is only dicta in that opinion. Second, *Cambist* cites *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965), as defining the distinction between "excess of jurisdiction" and

where the activities of the Attorney General depart from those which cast him in his quasi-judicial role, the protection of absolute immunity will not be available. *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977).

Justice Powell noted in *Imbler* that drawing the line between protected and unprotected conduct will be difficult. 424 U.S. at 431 n. 33, 96 S.Ct. 984. This case, dealing essentially with investigative activity, is within that gray area. We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the potential for needless actions. We believe

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"complete absence of jurisdiction." *Robichaud*, however, stands squarely for the proposition that:

> [W]hen a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws?

351 F.2d at 536. *See also Bauers* v. *Heisel*, 361 F.2d 581, 591 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967).

that the right to make the decision without being subject to suit must include some limited right to gather necessary information. At the same time, we are sensitive to the possibility that this narrow exception could be distorted to include all of a prosecutor's investigative activities. We hold only that to the extent that this securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself.

V.

Our reading of *Butz* and *Imbler* leads us to the conclusion that the Attorney General's decision to authorize the warrantless electronic surveillances is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function; however, when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity.[15] We foresee that a limited factual inquiry may in some cases be necessary to determine in what role

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[15] In language which may bear on the resolution of this issue, the Supreme Court in *Butz* pointed out:

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime or lawless conduct.

98 S.Ct. at 2910.

the challenged function was exercised. We recognize that this may result in some dilution of the protection of absolute immunity. However, this approach is necessary to protect fully the government official performing a protected function; at the same time, we must permit a private remedy to those whose constitutional rights were violated by an official acting outside the scope of absolute immunity.[16]

In *Forsyth* the district court found that "in authorizing the warrantless wiretap in this case, the Attorney General was functioning as an administrator rather than as an officer of the court," and denied the claim of absolute immunity. 447 F.Supp. at 201. However, the court has provided us with no statement of the reasons for its decision that the authorization of the warrantless wiretaps in this case falls within the Attorney General's administrative function. As we have noted, if the decision to authorize the wiretaps was made by the Attorney General in an attempt to secure information to deter-

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[16] Plaintiffs have also asserted a cause of action under 18 U.S.C. § 2520 (1976) for illegal interception of wire communications. *See* note 2 *supra*. Defendants' claim of absolute immunity for violations of federal statutory law certainly can fare no better than their claim for immunity against constitutional torts.

Moreover, defendants can find no aid in the statute itself. It provides: "A good faith reliance on a . . . legislative authorization shall constitute a complete *defense* to any civil . . . action brought under this chapter. . . ." (emphasis supplied) The greatest scope of protection which the defendants could derive from the words of the statute is a qualified, or good faith, immunity. *See Zweibon* v. *Mitchell*, 170 U.S.App. D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

mine whether to initiate a criminal prosecution, then he is entitled to absolute immunity from suit challenging that decision. Without a statement of the district court's analysis, we are unable to determine whether the Attorney General's conduct meets that test. Therefore, we must remand to the district court for additional consideration. In *Burkhart*, the district court initially ruled on the immunity issue by denying defendants' motion to dismiss or, in the alternative, for judgment on the pleadings. The court found it sufficient that the plaintiffs had made allegations that the Attorney General had authorized the wiretaps in the course of supervising an investigation. 397 F.Supp. at 503 n. 4. Later, on a motion for summary judgment, the district court refused to reconsider its earlier decision denying the motion to dismiss on the ground of absolute immunity. 448 F.Supp. at 608 n. 33. The opinion does not disclose, however, whether the court made any inquiry into the circumstances surrounding the authorization. Therefore, we must remand *Burkhart*, as well, to the district court for an initial determination on the availability of absolute immunity in light of the evidence developed.

VI.

Finally, we must deal with the contention of the individual FBI agents that they are entitled to absolute immunity from suit for conducting the electronic surveillances. They argue that they are entitled to absolute immunity from suit derivatively from the absolute immunity accorded to the Attorney General.

Further, they argue that they were merely following the orders of their superior and should not be put to the test of either disobeying authority or being subject to liability.

Their argument is not persuasive. In *Johnson* v. *Alldredge*, 488 F.2d 820 (3d Cir. 1973), *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974), this court rejected the concept of derivative absolute immunity. There, we held that a prison warden was absolutely immune from suit.[17] However, we granted the prison guards only qualified immunity, even though they were merely implementing the policies formulated by the warden. *Johnson* again demonstrates that a decision on the scope of immunity depends on the functions performed by the particular official. Derivative absolute immunity would be inconsistent with that approach.

Butz places a heavy burden on the official claiming absolute immunity to demonstrate "exceptional cir-

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[17] We recognize that the primary holding in *Johnson*, that the prison warden was absolutely immune from suit, may no longer be valid. The prison warden had formulated a prison regulation which was held to violate the constitutional rights of the plaintiff. Relying on *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), we held that the warden was entitled to absolute immunity because the formulation of regulations was a discretionary act and was within the outer perimeter of his duties. As we discussed above, however, *Butz* teaches that the *Barr* v. *Matteo* test does not apply when the official is charged with constitutional violations. Nevertheless, to determine entitlement to absolute immunity, we analyzed the warden and the guards separately under the *Barr* test. Our implicit rejection of derivative absolute immunity survives *Butz*.

cumstances" which would justify such a high level of protection. The agents have made no attempt to bring themselves within the *Butz* test. They do not claim a common law immunity from suit. Indeed, they concede the well established rule that federal law enforcement officers are entitled only to qualified, or good faith, immunity. The special considerations which lead us to grant absolute immunity to a prosecutor's decision to initiate and present a criminal action are simply not present when a federal law enforcement officer is charged with constitutional violations.

Moreover, we wish to emphasize that we have not left the FBI agents defenseless. If they acted in "good faith" in following the instructions of their superiors, then they will prevail. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *see also Wood* v. *Strickland*, 420 U.S. 308, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1975) (defining "good faith" for purpose of qualified immunity). On the other hand, if they knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty.

VII.

We hold that the Attorney General will be absolutely immune from suit for his decision to authorize the warrantless electronic surveillances only if his decision was made in the performance of a function that is intimately related to the judicial process.

We believe that a determination of the role in which the decision was made may require some inquiry into the circumstances surrounding the decision. As Justice Powell recognized, a prosecutor's quasi-judicial activities are not limited to those which take place in the courtroom. The decision to initiate a criminal prosecution, which we believe includes some limited right to gather information necessary to make that decision, is one such protected function. We are unable to determine from the record whether the district courts in *Forsyth* and *Burkhart* applied the appropriate legal test. Therefore, we must remand both cases to the district courts to conduct any additional inquiry that may be necessary and to apply the test enunciated here. Finally, we hold that the individual FBI agents are not entitled to derivative absolute immunity, and therefore, we will affirm the district courts on that issue.

Each side shall bear its own costs.

APPENDIX H

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

Civ. A. No. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, Individually and as Attorney General of the United States, L. PATRICK GRAY, 3RD, Individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE

Feb. 14, 1978

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

Plaintiff, Keith Forsyth, initiated this civil action in 1972 to recover damages in connection with the federal government's electronic interception of telephone conversations, which he claims violated his rights under 18 U.S.C. § 2510-2520 and the First, Fourth and Ninth Amendments of the Constitution of the United States.[1] The defendants remaining in

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[1] The plaintiff had originally alleged a violation of his rights under 47 U.S.C. § 605, but now concedes that he has no cause

this action [2] are former Attorney General of the United States John Mitchell, who authorized the wiretap, and two Federal Bureau of Investigation employees, who intercepted the conversations. The plaintiff bases his cause of action upon the undisputed facts that the wiretap placed upon the telephone of William Davidon was warrantless and without court approval, and that during this surveillance, conversations of the plaintiff were overheard and recorded.[3] Discovery in this case has been completed, although at the defendants' request many of the documents and briefs have been filed with the Court *in camera*. Presently before the Court are cross-motions for summary judgment on the issue of liability. Having heard oral argument, we now determine that both these motions will be denied on the ground that there exists a genuine issue of material fact.

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of action thereunder. He has also agreed that the Sixth Amendment claim asserted in the complaint should be dismissed for failure of proof.

[2] In his complaint the plaintiff had included as defendants former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray. He has admitted, however, that his claims against them should be dismissed.

[3] The disclosure of this electronic surveillance was made by the United States in response to an 18 U.S.C. § 2520 motion to suppress filed March 15, 1972, in the then pending criminal action *United States* v. *William Anderson*, Criminal No. 602-71 (D.N.J.).

The defendants claim that they are entitled to summary judgment on the basis of the record for the following reasons:

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 is not applicable to national security electronic surveillances;

2. *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), should not be applied retroactively to give plaintiff a cause of action;

3. The defendants have an absolute immunity in this action for damages; and

4. The defendants' affirmative good faith defense has been established by the record.

On the other hand, the plaintiff contends that he is entitled to summary judgment on the following grounds:

1. The electronic surveillance in question violated Title VIII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, as well as the Fourth Amendment;

2. *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), should be given retroactive application; and

3. The defendants have no absolute immunity and have failed to establish an affirmative defense of good faith.

Material Facts As To Which There Is No Genuine Issue.

The pleadings, answers to interrogatories and the deposition of former Attorney General Mitchell filed in this case contain the following material facts as to which there does not appear to be a genuine issue.

In June, 1970, the Philadelphia office of the FBI learned from a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to damage underground heating systems in Washington, D.C. to demonstrate its opposition to the war in Vietnam. At that time the FBI was also informed that ECCSL was responsible for several draft board raids. The FBI began an investigation into these alleged activities.

On August 21, 1970, the same person informed the FBI that at least three people, including Professor William Davidon of Haverford College, had discussed the possibility of kidnapping Henry Kissinger. The Government was furnished with copies of letters in which the idea was considered. These letters were written by two members of ECCSL, Father Phillip Berrigan and Sister Elizabeth McAlister. This information was relayed to the Attorney General, Dr. Kissinger and Presidential Assistant John Ehrlichman in a memorandum by FBI Director J. Edgar Hoover on September 4, 1970. The Philadelphia office of the FBI was assigned primary responsibility for the criminal investigation and was directed to prepare a comprehensive report concerning ECCSL.

On October 12, 1970, the Philadelphia office of the FBI requested the Department of Justice to evaluate the report it had prepared "for a prosecutive opinion." At that time the Philadelphia office was "considering electronic surveillance feasibility for William Davidon." On November 13, 1970, a Department of Justice report concluded that there was a "reasonably good prosecutable case against eleven individuals" with respect to the draft board case, but that there was "not sufficient evidence to obtain a conviction" for the conspiracy to kidnap Dr. Kissinger or to damage the utility system in Washington, D.C.

On November 6, 1970, at the request of the FBI, Attorney General Mitchell authorized the wiretap on Davidon that is the subject of this lawsuit. This tap was placed and continued with one extension, until January 6, 1971. The sworn answers of FBI Special Agent Fields reveal that in the view of the Federal Bureau of Investigation, the electronic surveillance upon which plaintiff's conversations were overheard was instituted for the purpose of gathering intelligence-type information under circumstances where it was also anticipated that information of a criminal evidentiary nature might be obtained. He further stated that under the guidelines which had been issued to FBI field offices concerning electronic surveillance authorized by the Attorney General for national security intelligence gathering purposes, monitoring personnel were instructed to monitor and record conversations unless it was known that a particular individual speaking on the surveilled telephone

line was a defendant in a federal criminal case or an attorney for a defendant in a federal case. With respect to the national security electronic surveillance on which plaintiff's conversations were overheard, neither the subject of that surveillance nor other individuals whose conversations were expected to be overheard were defendants or attorneys for defendants in a federal criminal case, and therefore no particular instructions were given the two FBI employees "to minimize the interception of communications not relevant to the alleged purposes for the interceptions." The plaintiff was overheard on three occasions.

A federal grand jury in Harrisburg, Pennsylvania began hearing evidence on December 13, 1970 regarding a plan to destroy underground utility tunnels in Washington, D.C. and to kidnap Dr. Henry Kissinger. In 1971 true bills were found in connection with two indictments, the prosecution of which became known as the trial of the Harrisburg Eight.

The Warrantless Electronic Surveillance In This Case Violated The Fourth Amendment.

Since 1967, when the United States Supreme Court handed down its decision in *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), there has been little doubt that, except for certain well-delineated exceptions,[4] a warrant is necessary for electronic surveillance of criminal activity unre-

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[4] *See, Katz*, 389 U.S. at 357-58, 88 S.Ct. 507.

lated to the national security interest. Furthermore, since 1972 when the Supreme Court decided *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), there has been little doubt that a warrant is also necessary in matters involving the national security interest, except for surveillances based on threats to the national security involving foreign powers.[5] It follows, therefore, that the warrantless electronic surveillance placed on the telephone of William Davidon in November 1970 was unconstitutional. The memorandum by which the Attorney General personally authorized this wiretap claimed that it was necessary to protect the national security interest in connection with the activities of a domestic organization. The Government made no claim that a foreign power was involved. Since *District Court*, there is no question that such a warrantless electronic surveillance is unconstitutional. In this civil action for damages, wherein the plaintiff claims that he was overheard on the warrantless wiretap, the issue presented is whether the plaintiff is entitled to recover monetary damages under either 18 U.S.C. §§ 2510-2520 or the Fourth Amendment.

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[5] *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. (en banc), *cert. denied*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974). *But see, Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

District Court Should Not Be Given Nonretroactive Application.

The defendants take the position that no liability on plaintiff's Fourth Amendment claim should be imposed in this civil litigation because under *Chevron Oil* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *District Court* should be given only prospective application.[6] In *Chevron Oil*, the United

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[6] We are not dealing with a criminal case and therefore do not consider Supreme Court decisions in that area. Justice Harlan characterized the Supreme Court's application of the nonretroactivity doctrine in criminal cases in *Desist* v. *United States*, 394 U.S. 244, 256-57, 89 S.Ct. 1030, 1038, 22 L.Ed.2d 248 (1969) (dissenting opinion):

> In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied, *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), we have created an extraordinary collection of rules to govern the application of that principle. We have held that certain 'new' rules are to be applied to all cases then subject to direct review, *Linkletter* v. *Walker*, *supra*; *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller* v. *Alaska*, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968); and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred. *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *De Stefano* v. *Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968).

States Supreme Court set out the criteria for deciding when a decision should be given nonretroactive application in a civil case:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker*, *supra*, 381 U.S. at 629, 85 S.Ct. 1731. Finally, we [must] weigh the inequity, imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by holding of non-retroactivity." *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969). *Id.* at 106-07, 92 S.Ct. at 355.[7]

As to whether *District Court* overruled a "clear past precedent," we find that prior to *District Court*, there was no clear rule of law which would have authorized the warrantless electronic surveillance in the instant case. Thus, *District Court* did not overrule

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[7] For an excellent discussion of this portion of *Chevron Oil*, see Judge Gibbons' analysis in *Kacher* v. *Pittsburgh Nat'l Bank*, 545 F.2d 842, 849-52 (3d Cir. 1976) (dissenting opinion).

any clear past precedent. Whether *District Court* decided "an issue of first impression whose resolution was not clearly foreshadowed" in November 1970 when the wiretap in this case was placed, presents a more difficult question. Prior to the decision in *District Court* in June 1972, several federal courts had been presented with the precise question decided in *District Court*, but they had reached divergent conclusions. On one hand, Judge Hoffman held in *United States* v. *Dellinger*, 69 CR 180 at 20 (N.D.Ill. Feb. 20, 1970):

> because the matter of when electronic surveillance is reasonably necessary to investigations carried out to protect the national security is a matter not suitable for a judicial determination, but is rather best left to the authorization of the President or his chief legal officer, the Attorney General, I conclude that *electronic surveillance in national security cases is not subject to the warrant requirements* of the Fourth Amendment. (emphasis added).

And Chief Judge Stanley of the District of Kansas stated on the record in *United States* v. *O'Neal*, KC-CR-1204 on September 1, 1970:

> all of the [warrantless] interceptions, the wiretaps, in this case, . . . *were legally obtained within the inherent constitutional power of the President* because of his responsibility to gather intelligence information having to do with matters vital to national security . . . (emphasis added).

On the other hand, Judge Ferguson stated in *United States* v. *Smith*, 321 F.Supp. 424, 429 (C.D.

Cal. 1971), on January 8, 1971, just two days after the Davidon tap was removed:

> [t]his court is forced to conclude that in wholly domestic situations *there is no national security exemption from the warrant requirement* of the Fourth Amendment. (emphasis added).

Shortly thereafter, the district court judge in *District Court* stated in response to the Government's claim that the President, acting through the Attorney General, is clothed with the power to authorize warrantless wiretaps for domestic security purposes:

> [i]n the opinion of this Court, the position of the Attorney General is untenable. *It is supported neither historically, nor by the language of the Omnibus Crime Act.* Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today. *United States* v. *Sinclair*, 321 F.Supp. 1074, 1079 (D.Mich.1971), *aff'd sub nom. United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (emphasis added).

The most relevant Supreme Court case prior to *District Court* was *Katz*, wherein the Court made it clear that a warrant was necessary for all types (even nontrespassory) of electronic surveillance of criminal activity unrelated to the national security interest. In *Katz*, Justice Stewart stated in the majority opinion:

> [w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth

> Amendment in a situation involving the national security is a question not presented by this case. 389 U.S. at 359 n. 23, 88 S.Ct. at 515.

Although six other Justices agreed with the decision of the Court, three felt compelled to write concurring opinions in order to express their views on this issue. Justice White wrote:

> [w]e should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, has considered the requirements of national security and authorized electronic surveillance as reasonable. *Id.* at 364, 88 S.Ct. at 518.

Justice Douglas, with Justice Brennan joining, wrote:

> [n]either the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, [we] cannot agree that where spies and saboteurs are

> involved adequate protection of the Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate. *Id.* at 359-60, 88 S.Ct. at 516.

In view of our determination in connection with the second and third criteria for nonretroactivity, we do not find it necessary to decide the question of whether *District Court* decided "an issue of first impression whose resolution was not clearly foreshadowed" in 1970.[8]

The second criterion for nonretroactivity set forth in *Chevron Oil* is whether application will further or retard the purpose of the ruling. The purpose of the rule enunciated in *District Court* was to protect people from unwarranted intrusions into their privacy by the administrative arm of their government. Denying nonretroactivity will not retard, but should encourage vigilance and solicitude for the Fourth Amendment rights of persons, particularly in close cases.

The third and final criterion for nonretroactivity in *Chevron Oil* is whether there will be injustice or hardship to the parties. In this case, as we hereinafter determine, the defendants will be afforded an opportunity to establish a good faith defense. Obvi-

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[8] The use of warrantless electronic surveillance by previous Presidents and Attorneys General is discussed in *District Court, supra*, 407 U.S. at 310, 92 S.Ct. 2125 and in *Zweibon*, 170 U.S.App.D.C. at 23, 516 F.2d at 616.

ously, retroactive application is not inequitable to the plaintiff. Thus, none of the parties will suffer an unjust hardship if *District Court* is retroactively applied. In view of our determination that the second and third criteria of *Chevron Oil* have not been met, we conclude that the record in this civil case does not support a holding of nonretroactivity pursuant to *Chevron Oil*.[9]

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[9] Nonretroactive application of new Fourth Amendment doctrines is frequently mandated in criminal cases. *See, e.g., Desist* v. *United States*, 394 U.S. 244, 247-48, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). Nevertheless, *District Court* was not given nonretroactive application when the electronic surveillance at issue in this case was challenged in the criminal trial of *United States* v. *Ahmad*, 335 F.Supp. 1198, 1200 (M.D.Pa. 1971), wherein Judge Herman ruled the wiretap illegal under *District Court*, and, therefore, ordered the fruits of the surveillance suppressed. Furthermore, the Third Circuit, when presented with these determinations, stated, 499 F.2d 851, 853 n. 2 (3d Cir. 1974):

> Judge R. Dixon Herman, who presided over the [Harrisburg Eight] case, found that there had been an unauthorized and illegal wiretap.[2]

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[2] The electronic surveillance apparently had been performed without a court order in accordance with a Presidential determination that national security was involved. Judge Herman relied on the decision of the Court of Appeals in *United States* v. *United States District Court*, 444 F.2d 651 (6th Cir. 1971), later affirmed by the United States Supreme Court at 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) in deciding that the wiretap was illegal.

The Electronic Surveillance In This Case Is Subject To The Procedures And Remedies Of 18 U.S.C. §§ 2510-2520.

The defendants contend that the national security electronics surveillance in this case does not violate any of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The basis of their contention is that § 2511(3) of the Act exempts electronic surveillances conducted for national security purposes. Section 2511(3) provides:

> (3) Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necesary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. . . .

The United States Supreme Court stated in *District Court* that the purpose of § 2511(3) was to "provide that the Act shall not be interpreted to limit or disturb such power as the President may have under the

Constitution. In short, Congress simply left presidential powers where it found them." 407 U.S. at 303, 92 S.Ct. at 2130.

The question as to whether electronic surveillance for national security purposes became subject in 1968 to the procedures and remedies of 18 U.S.C. §§ 2510-2520 was determined by the District of Columbia Circuit in *Zweibon* v. *Mitchell*, 170 U.S.App. D.C. 1, 516 F.2d 597 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). In an opinion for the plurality by Judge Wright, the court held that electronic surveillance of the type involved in the instant case is subject to both the procedures and the remedies provided by the Act.[10] In his opinion Judge Wright reasoned:

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[10] Judge Wright described the responsibility of the judiciary in the area of electronic surveillance for "national security" as follows:

> Undoubtedly the President, our Chief Executive and Commander-in-Chief of our Armed Forces, is imbued by the Constitution with vast and indispensable powers for dealing with the vital problems generated by our relations with foreign powers, including the duty to protect this country from foreign aggression or subversion. The very existence of such tremendous power, however, renders it susceptible to abuse and endangers those fundamental personal liberties which the Government was instituted to secure for its citizens and whose exercise elevates the nation to a statute worthy of defense. Thus, although the attempt to claim Executive prerogatives or infringe liberty in the name of security and order may be motivated by the highest of ideals, the judiciary must remain vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds. 170 U.S.App.D.C. at 8-9, 516 F.2d at 604-05 (footnotes omitted).

Since we do not believe the [*District Court*] case held the standards and procedures of Title III to be inapplicable when a purported national security surveillance is involved, we must look to the language and legislative history of Section 2511(3) to determine congressional intent in its enactment. Section 2511(1) unequivocally declares that '[e]xcept as specifically provided in this chapter,' interception of '*any* wire or oral communication' is illegal. Section 2511(3), however, only states that '[n]othing contained in this chapter * * * shall limit the *constitutional* power of the President' to take the actions he deems necessary in the field of national security. Since Section 2511(3) is merely a disclaimer that 'constitutional' actions by the President are not to be invalidated under the statute, it is reasonable to assume that Congress intended to prohibit 'unconstitutional' Executive surveillance, which would therefore be 'in violation of this chapter' within the comprehension of the damages provision of Title III. Thus, even if the *procedures* of Title III were inapplicable to national security wiretapping, the *remedies* of Title III should apply to *unconstitutional* exercises of presidential power.

An analysis of the legislative history of Title III also indicates that it would be reasonable to interpret Section 2511(3) as a statement that the question reserved in *Katz* should be left for judicial resolution, but that, *to the extent the President does not have the constitutional power to engage in warrantless surveillance activities, the procedures and remedies of Title III are fully operative.* This interpretation is fully consistent

> with the [*District Court*] Court's understanding of the legislative history of Section 2511(3) and the two-decade struggle in Congress concerning wiretap legislation.

Id. at 67-68, 516 F.2d at 663-64 (emphasis supplied in part). *Accord, Kinoy* v. *Mitchell*, 331 F.Supp. 379, 382 (S.D.N.Y. 1971).

We agree with *Zweibon* that the procedures and remedies of Title III apply to all electronic surveillance which must, by virtue of the Fourth Amendment, be conducted pursuant to a warrant. Since, as we have heretofore pointed out, a warrant was constitutionally required under the circumstances of this case, it would appear that the remedies provided in Title III should be made available to the plaintiff, unless the defendants establish an affirmative good faith defense, as hereinafter discussed.[11]

The Defendants Are Limited To An Affirmative Good Defense.

The defendants seek to avoid liability by asserting that they have an absolute immunity from suit for discretionary acts done within the scope of their authority because they are high ranking government officials. They contend that this is the law in the Third Circuit and cite three pre-1975 cases: *Skehan* v.

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[11] Although it does not appear that the defendants are contending that the nonretroactivity doctrine of *Chevron Oil* should be applied to nullify the effect of Title III in this case, it is nevertheless our opinion that the reasons hereinbefore stated for the retroactive application of *District Court* would likewise be applicable here.

Board of Trustees of Bloomsburg State College, 501 F.2d 31, 43 (3d Cir. 1974), *vacated*, 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975); *Fidtler* v. *Rundle*, 497 F.2d 794, 802 (3d Cir. 1974); and *Johnson* v. *Alldredge*, 488 F.2d 820, 824 (1974). However, as the Third Circuit stated in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F2d 53, 59-60 (3d Cir.) (en banc), *cert. denied*, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976):

> [u]pon . . . consideration we conclude that *Wood* v. *Strickland* [420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)] significantly modified the law of immunity upon which we relied in affirming the district court . . . . It was our view [then] that if the government officials performing discretionary government duties acted within the scope of their official responsibilities, they were immune from damage actions . . . .
>
> *Wood* v. *Strickland*, *supra*, demonstrates that we erred in assuming that there still existed an unqualified, common law immunity covering non-judicial . . . government officials performing adjudicatory functions.

It therefore appears that government officials, even high ranking government officials such as the Attorney General of the United States, no longer have available to them the defense of absolute immunity on the ground that they were performing discretionary duties within the scope of their official responsibilities.

We must determine, however, whether the Attorney General, who, next to the President, is our na-

tion's highest executive officer directly responsible for the administration of justice, is entitled to an absolute immunity in connection with his authorization of the unconstitutional electronic surveillance in this case. Fortunately *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) provides some guidance for the resolution of this issue. In *Imbler*, the United States Supreme Court decided that a state prosecuting attorney who acted within the scope of his duties by initiating and pursuing a criminal prosecution was entitled to absolute immunity. In arriving at its determination that a prosecutor does have absolute immunity in the performance of acts "intimately associated with the judicial phase of the criminal process," the Court placed reliance upon *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927), in which absolute immunity was granted to a special assistant to the Attorney General of the United States in connection with an action of malicious prosecution based on an indictment and prosecution. In delineating the boundaries of its holding, however, the Court stated:

> [w]e agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative of-

> ficer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983. 424 U.S. at 430, 96 S.Ct. at 995.

Here we are concerned with actions of the Attorney General in authorizing a warrantless wiretap. As the *Imbler* Court stated in a footnote:

> [p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them. *Id.* at 431 n. 33, 96 S.Ct. at 995 n. 33.

It is therefore our opinion that in authorizing the warrantless wiretap in this case, the Attorney General was functioning as an administrator rather than as an officer of the court. We must conclude that the Attorney General is not entitled to absolute immunity in connection with this warrantless electronic surveillance.

The Defendants May Assert A Good Faith Affirmative Defense To Plaintiff's Fourth Amendment Claim.

In *Zweibon*, decided prior to the Supreme Court's pronouncements in *Imbler*, the District of Columbia Circuit Court determined that in a civil action for

damages, the Attorney General was entitled to assert a good faith defense in connection with his authorization of a warrantless wiretap.[12] We shall follow the lead of our learned colleague, Judge VanArtsdalen, in *Burkhart* v. *Saxbe*, 397 F.Supp. 499, 502 (E.D.Pa.1975) and hold that the Attorney General and the two FBI agents, the defendants who remain in this case, are permitted a good faith defense to the plaintiff's Fourth Amendment claim. The burden is therefore on the defendants, as stated in *Skehan*, to come forward and convince the trier of fact by a preponderance of the evidence that (1) they did not know and reasonably need not have known that their actions would constitute a violation of plaintiff's constitutional rights; and (2) they acted without a malicious intention to deprive the plaintiff of his constitutional rights or cause him to suffer other injury.

The Defendants May Assert A Good Faith Affirmative Defense To Plaintiff's Statutory Claim.

We are also presented with the question whether there is any defense available to the defendants in connection with the plaintiff's claim for damages pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. *Zweibon* is the only case specifically discussing this issue which has been called to our attention. In *Zweibon*, after holding that the electronic surveil-

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[12] *See also, Halperin* v. *Kissinger*, 424 F.Supp. 838, 842, 844 n. 8, 845 (D.D.C. 1976); *Hallinan* v. *Mitchell*, 418 F.Supp. 1056, 1057 (N.D.Cal. 1976).

lance authorized in 1970 by the Attorney General without a court order was illegal, the court concluded that Congress intended that the defendants should have a good faith defense to the statutory claim, although § 2520 of Title 18 specifically provides:

> A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.[18]

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[18] Title 18 U.S.C. § 2518(7) provides:

> Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
>
> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

In accordance with *Zweibon*, we hold that the defendants shall have the opportunity to present the same good faith defense to the plaintiff's statutory claim, as heretofore set forth from the *Skehan* decision.

A Genuine Issue Of Material Fact Exists.

The defendants urge this Court to enter summary judgment in their favor. It is their position that the record establishes their good faith affirmative defense. Other than the pleadings and briefs, the only documents which have been filed are defendants' answers to interrogatories and the deposition of John Mitchell. The plaintiff opposes this motion, but has filed no affidavits or depositions. As heretofore determined, the defendants have the burden of establishing by a preponderance of the evidence that (1) they did not know and reasonably need not have known that conducting the warrantless wiretap in this case was unconstitutional; and (2) they acted without malicious intention to (a) deprive the plaintiff of his constitutional rights or (b) cause him to suffer other injury. *Skehan, supra.*

In connection with the defendant's motion for summary judgment, the law is clear that the defendants have the burden of demonstrating that there is no genuine issue of material fact. *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F.2d 817, 824 (3d Cir. 1951), quoted with approval in *Ettinger* v. *Johnson*, 556 F.2d 692, 696 (3d Cir. 1977). Moreover, in considering the motion for summary judg-

ment, the Court must view the evidence in a light most favorable to the party opposing the motion. *Goodman* v. *Mead Johnson & Company*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). In considering the evidence contained in the deposition of John Mitchell and the defendants' answers to interrogatories in a light most favorable to the plaintiff, it is apparent that there are genuine issues of material fact concerning the good faith defense of the defendants. As the Third Circuit in *GAF* v. *Amchem Products, Inc.*, 570 F.2d 457 at 461 (3d Cir. 1978) pointed out: "[a] factfinder might draw a different inference, but on a motion for summary judgment the inference favorable to [the party opposing the motion] must prevail." Furthermore, as stated in *Toebelman* v. *Missouri-Kansas Pipe Line Company*, 130 F.2d 1016, 1018 (3d Cir. 1974), "[t]he evidence contradicting or impeaching that of the movant . . . may appear in the movant's own evidentiary materials." Finally, Wright & Miller, *Federal Practice & Procedure* § 2712, at 278-82 (1973), quoted with approval in *Rosenthal* v. *Rizzo*, 555 F.2d 390, 393 (3d Cir. 1977), provides: "[a] motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of fact issues."

With respect to the plaintiff's motion for summary judgment, we find that in viewing the evidence in the deposition and answers to interrogatories in a light favorable to the defendants, the plaintiff has

likewise failed to carry his burden of demonstrating that there is no genuine issue of material fact.

Furthermore, after making its determination that the defendants in *Skehan* were entitled to a good faith defense, the Court remanded the case for "findings of fact with respect to the [good faith] immunity of each defendant." Accordingly, an order will be entered denying the parties' cross-motions for summary judgment on the ground that there are genuine issues of material fact in connection with the defendants' affirmative defense of good faith.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-826

KATHERINE W. BURKHART, ET AL.

v.

WILLIAM SAXBE, ET AL.

[Filed Aug. 23, 1984]

OPINION AND ORDER

VANARTSDALEN, J.

The primary issue before the court is whether John N. Mitchell is liable in damages to persons whose conversations were overheard during non-consensual telephone wiretaps that were authorized by him as "national security" surveillances in his capacity as Attorney General of the United States. The parties have filed cross motions for summary judgment and agree that there are no genuine issues of material fact in dispute.

The two wiretaps in question, one on the telephone of William Davidon, the other on the telephone of the Black Panther Party, were authorized, installed, implemented and terminated more than a year prior to the decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972) (hereafter referred to as "*Keith*"). By the time *Keith* was decided on June 19, 1972, the wiretaps at issue had long since been terminated (at least as of February 10, 1971). In *Keith*, the Supreme Court held for the first time that a wiretap surveillance, even when authorized by the Attorney General for "domestic national security purposes," required the issuance of a judicial warrant before installation of the wiretap.

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (citations and footnote omitted), the Supreme Court announced a rule of law that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The Court further stated:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. (footnotes omitted).

In *Forsyth* v. *Kleindienst*, 729 F.2d 267 (3d Cir. 1984) *(Forsyth II)*, Circuit Judge Weis, in dissent,[1] opined that former Attorney General John N. Mitchell was entitled, at least, to the type of "qualified immunity" described in *Harlow*, and on the basis of the record, entitled to summary judgment in his favor.[2] Primarily for the reasons so clearly set forth by Judge Weis in *Forsyth II*, I conclude,

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[1] Although I may not adopt a dissenting opinion of the Court of Appeals for the Third Circuit in preference to a majority opinion, in *Forsyth II*, the majority opinion did not address the substantive issue of qualified immunity. The majority of the panel concluded that the question was not properly before the court because the district court had not entered a final judgment as to damages.

[2] The wiretap in *Forsyth II* involved a wiretap on the telephone at the residence of William Davidon. This same wiretap is one of the two wiretaps at issue here. Thus, if the Attorney General is immune in *Forsyth II* under the *Harlow* doctrine, he necessarily is likewise immune in the present action for all telephone conversations overheard on the Davidon wiretap.

on the basis of the record established in this case that the defendant, John N. Mitchell, is entitled to qualified immunity and that summary judgment should be entered in his favor.[3]

This case and the *Forsyth* case have been the subject of several published opinions in both the district court and the court of appeals. *See Burkhart* v. *Saxbe*, 448 F. Supp. 588 (E.D. Pa. 1978), *aff'd in part and remanded sub nom. Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) *(Forsyth I)*; *Forsyth* v. *Kleindienst*, 447 F. Supp. 192 (E.D. Pa. 1978), *aff'd in part and remanded*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S. 913 (1981) (also cited as *Forsyth I* because the court of appeals decided both cases in a single opinion); *Forsyth* v. *Kleindienst*, 551 F. Supp. 1247 (E.D. Pa. 1982), *stay granted*, 700 F.2d 104 (3d Cir. 1983), *aff'd in part, dismissed in part, petition for mandamus denied*, 729 F.2d 267 (3d Cir. 1984) *(Forsyth II)*. Consequently, only a few essential facts need be reiterated.

I initially ruled that a full evidentiary hearing was required to determine

> (1) whether the wiretaps in question were conducted for national security purposes or solely for the purpose of investigating criminal or political activity; (2) whether, even if conducted for national security purposes, the defendants are immune from any liability for their failure to secure a warrant in compliance with the fourth amendment and (3) whether, in any event, this surveillance was conducted in a reasonable manner under the fourth amendment as interpreted in *Berger* v. *New York*, *supra*.

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[3] Clarence Kelley and William Saxbe are the only other identified defendants. The record fails to show that they were in any way involved in authorizing, installing, monitoring or otherwise conducting or supervising the wiretaps. I previously so ruled, but judgment was never formally entered in their favor. *See Burkhart* v. *Saxbe*, 448 F. Supp. 588, 607 (E.D. Pa. 1978), *aff'd in part and remanded sub nom. Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, 453 U.S.. 913 (1981). Consequently, summary judgment will be entered in favor of all defendants and against all plaintiffs.

Burkhart, 448 F. Supp. at 610. The court of appeals decision directly addressed only the issue of absolute immunity. "We hold that the Attorney General will be absolutely immune from suit for his decision to authorize the warrantless electronic surveillances only if his decision was made in performance of a function that is intimately related to the judicial process. *Forsythe I*, 599 F.2d at 1217.

In *Forsyth II*, the court of appeals ruled that the former Attorney General had not established a right to absolute immunity as to the Davidon wiretap, under its formulation set forth in *Forsyth I;* namely, he had not proved that the wiretap was for "a function that is intimately related to the judicial process." *See Forsyth I*, 599 F.2d at 1217. Although theoretically in the *Burkhart* case there could be different evidence as to the purpose of the Davidon wiretap, it would be a strange result to find absolute immunity in *Burkhart* and not in *Forsyth* where the overheard conversations for which damages are sought arose out of the same wiretap authorization on the telephone of William Davidon. In any event, to the extent the issue of absolute immunity may still be open, under the *Forsyth I* test, there is clearly no absolute immunity. The former Attorney General has always taken the position that both the Davidon and Black Panther Party wiretaps were for "national security" and not for criminal investigative purposes.[4] Because I conclude that the former Attorney General is entitled to qualified immunity as a complete defense to this action, it becomes, in any event, unnecessary to decide the issue of absolute immunity.

On the present motion for summary judgment, defendant John N. Mitchell relies solely on the contention that under *Harlow* he has established all that is necessary to come

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[4] If not foreclosed by *Forsyth II*, I would nevertheless conclude that the "special functions" doctrine suggested in *Harlow*, 457 U.S. at 811-12, would provide absolute immunity from a civil damage action against the former Attorney Geneal in this case. In addition, the Black Panther Party wiretap would appear to come within the "foreign national security wiretap" exception to the warrant requirement. *See Forsyth I*, 599 F.2d at 1206. *See also United States* v. *Butenko*, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974).

within the protection of a qualified immunity. I fully agree. In *Harlow* the Supreme Court held:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818 (citations and footnote omitted). It is not necessary to review the long and uncertain path of the law leading up to *Keith* where the Supreme Court finally squarely ruled that "prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe." 407 U.S. at 324.

Although logical argument may be made that the ultimate decision was "foreshadowed" by earlier case law and was not a break with prior law, nothing in *Harlow* suggests that officials must, at peril of being liable for civil damages, correctly foretell the future of Supreme Court and other court decisions in areas of constitutional conduct. The test enunciated in *Harlow* is that of "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 812 (citations and footnote omitted).

In the event that there may have been any lingering doubts as to the Supreme Court's holdings in *Harlow*, the Court recently emphasized in *Davis* v. *Scherer*, 104 S. Ct. 3012 (1984), the necessity of applying an objective test and that the law must have been clearly established:

> *Harlow* v. *Fitzgerald*, *supra*, rejected the inquiry into state of mind in favor of a wholly objective standard. Under *Harlow*, officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ... Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." ... No other "circumstances" are relevant to the issue of qualified immunity.

. . . .

> We conclude that the District Court correctly held that appellee has demonstrated no violation of his *clearly established* constitutional rights.

Id. at 3018, 3019 (emphasis in original). The Court made quite explicit that an official need not be clairvoyant when it noted:

> Yet, under appellee's submission, officials would be liable in indeterminate amount for violation of *any* constitutional right—one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation. . . .

Id. at 3019 (emphasis in original).

The decisions of the Supreme Court have consistently held that governmental officials, exercising discretionary functions are entitled to "some form of immunity from suits for civil damages." *Nixon* v. *Fitzgerlad*, 457 U.S. 731, 744 (1982); *Harlow*, 457 U.S. at 806. Qualified immunity for executive officials is the norm. *Harlow*, 457 U.S. at 807. Where a defendant establishes that he is an executive official, performing discretionary duties, the plaintiff must "overcome" the qualified immunity. The concluding paragraph of *Davis* v. *Scherer* states:

> A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. As appellee has made no such showing, the judgment of the Court of Appeals is reversed. . . .

104 S. Ct. at 3021.

The applicable Supreme Court decisions establish that in order to prevail plaintiffs have the burden of establishing two distinct elements. One, that the law was clearly established at the time the wiretaps were authorized; and two, that the former Attorney General, as a "reasonable person" would have known the law. Plaintiffs suggest that if a reasonable person would know that at some time in the future the law would be clearly established that certain conduct is (and logically always was) unconstitutional, such would be a sufficient showing to allow the case to proceed. As hereto-

fore noted, the Supreme Court has never suggested that a governmental official must anticipate the future course of the law.

I think it is unnecessary to review the case law as it existed in 1970 when the Davidon and the Black Panther Party wiretaps were authorized by the Attorney General. In *Keith* the Supreme Court certainly recognized that it had never previously ruled on the question of the requirement for a warrant in domestic security wiretaps. The opening paragraph of *Keith* makes this clear:

> The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the congress or a definitive decision of this Court. *This case brings the issue here for the first time.*

407 U.S. at 299 (emphasis added) (footnote omitted).

In short, I completely agree with the analysis of Judge Weis in his dissenting opinion in *Forsyth II*. I likewise am convinced that by any fair objective test, at the time the wiretaps in question were authorized by the Attorney General and throughout the entire time that the wiretaps were in place, the law that domestic national surveillance wiretaps authorized by the Attorney General required warrants was not "clearly established." Indeed, the rule of constitutional law, for which plaintiffs seek damages from the former Attorney General, was not then even "established," let alone "clearly established" by controlling case law.

The requirement that the surveillance be for "national security" must also be addressed. Case law does not clearly define what constitutes a "national security" wiretap. Also, in a case such as this, where the claim of qualified immunity should, if possible, be determined without a trial, *see Harlow*, 457 U.S. at 818; *Davis* v. *Scherer*, 104 S. Ct. at 3020-21, the procedure by which the factual determination that a wiretap is a "national security" wiretap, as opposed

to a routine criminal or administrative investigation, has not been outlined by appellate court decision.

The subjective state of mind of the Attorney General in authorizing the wiretap should not be investigated under *Harlow*. If the record discloses a rational national security concern, this sould suffice, even though there may hve been other possible reasons or motives. *Halperin* v. *Kissinger*, 578 F. Supp. 231 (D.D.C. 1984). Plaintiffs argue that if it appears that there is "any significant purpose other than national security," the *government* should not be allowed to rely on "the national security label." Plaintiffs' Brief at 28. I do not agree, because if such "other purposes" test is utilized, lengthy fact-finding hearings and testimony as to the subjective state of mind of the official authorizing the wiretaps would bring about the precise harms that *Harlow* sought to obviate.

Whatever may be a proper definition of a "national security" wiretap, and its full contours, both the Davidon and Black Panther Party wiretaps certainly qualify as national security wiretaps. In effect, I previously so ruled in this case, *Burkhart*, 448 F. Supp. at 596-98, although I concluded that there remained a factual issue as to whether the surveillances may have had some other purposes. To the extent that my prior opinion suggested that the "sole purpose" of the wiretap had to be for national security, it must be disavowed in light of *Harlow*. *Harlow* requires a determination of the facts without inquiry into the subjective state of mind of the official.

In addition to the facts set forth in the discussion of the "national security" issue in *Burkhart*, 448 F. Supp. at 596-98, the court of appeals also extensively reviewed the history leading up to the implementation of the Davidon and Black Panther Party wiretaps in *Forsyth I*, 599 F.2d at 1205-06. In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1084 (D.C. Cir. 1981), the District of Columbia Circuit held that the warrantless wiretap on the Black Panther Party was, under the submissions before that Court, "the clearest justification for a national security exception to Title III." Finally, Judge Broderick of this court, in *Forsyth* v. *Kleindienst*, 551 F. Supp. 1247, 1252 (E.D. Pa. 1982), *stay*

granted, 700 F.2d 104 (3d Cir. 1983), *aff'd in part, dismissed in part, petition for mandamus denied*, 729 F.2d 267 (3d Cir. 1984), concluded that the Davidon wiretap was not authorized pursuant to the Attorney General's prosecutorial duties. Judge Broderick noted that there was extensive evidence that showed the wiretap was for national security, including the deposition testimony of John N. Mitchell (taken before the *Harlow* decision) that the "'focus'" of the wiretap was "'[t]he gathering of information necessary to protect the national security and to get information on foreign intelligence.'" Judge Broderick stated that "[t]he Court has taken defendant Mitchell at his word." *Id.*

I conclude, on the basis of the entire record in this case, that the two wiretaps in question, *i.e.*, the Davidon and Black Panther Party wiretaps, were authorized by the defendant while he was the Attorney General of the United States, for national security purposes. I further conclude that at the time of the authorizations, including the authorized extensions of the wiretaps, the law was not "clearly established" that a warrant was required before implementing the wiretaps. The defendant is therefore entitled to qualified immunity.

In my prior opinion, 448 F. Supp. at 610, I directed that an evidentiary hearing would be held to determine whether the surveillances were conducted in a reasonable manner, compatible with the fourth amendment. Holding an evidentiary hearing for such purpose is doubtful procedure under *Harlow*. Nevertheless, there is probably some "reasonableness" requirement that must be met, to be determined from the objective record.

Where lawful wiretaps have been installed for purposes of normal criminal investigation, the law has long been clear that the carrying out of the wiretaps must be "narrowly circumscribed" with "appropriate safeguards" to prevent unnecessary invasions of privacy. *Katz* v. *United States*, 389 U.S. 347 (1967); *Berger* v. *New York*, 388 U.S. 41 (1967). Although neither *Katz* nor *Berger* detailed the exact requirements for limiting the scope and duration of wiretaps, Congress, in response, enacted Title III of the

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified at 18 U.S.C. 2510-2520), which included strictures upon authorized wiretaps that they "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . ." 18 U.S.C. § 2518(5). The inquiry as to whether the agents in carrying out the surveillance acted "reasonably" is to be based on an objective not a subjective standard. "Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Scott* v. *United States*, 436 U.S. 128, 139 (1978).

In *Keith*, the Supreme Court carefully avoided setting the standards of "reasonableness" for domestic national security surveillances. In doing so, the court further made clear, that although a warrant was required, the requirements of Title III might not be the proper tests:

> Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specific crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.

Keith, 407 U.S. at 322-23. The Supreme Court further suggested that Congress might decide that "the time and reporting requirements need not be so strict as those in § 2518." *Id.* at 323. Considering that *Keith* was decided more than a year after the wiretaps involved in this case were terminated, one can only conclude that as to national security wiretaps, there was no "clearly established" constitutional or statutory standards or guidelines for the Attorney General to follow in authorizing the wiretaps, other than the nebulous concept that they must be "reasonable."

Although plaintiffs have contended that the wiretaps do not properly fit within the somewhat unclear definition of "national security" surveillances, I do not understand plaintiffs to contend that it was unreasonable, per se, for the At-

torney General to authorize the wiretaps. Clearly he had probable cause to believe that the wiretaps might provide valuable intelligence information as to the matters under investigation and that the matters being investigated were properly within the Attorney General's sphere of duties. Plaintiffs do contend that the surveillances were not properly limited and minimized.

The Davidon wiretap was originally authorized on November 6, 1970, for one month, and an additional extension of one month was granted. The wiretap was terminated on January 6, 1970. The agents were instructed to record all conversations unless it was known that one of the parties to the conversation was a defendant in a federal criminal case or was an attorney for a criminal defendant. *Forsyth I*, 599 F.2d at 1206. The Black Panther Party wiretaps were in place from June 1, 1970 until February 10, 1971. Although there appears to be little to suggest that the wiretaps were otherwise limited in time or scope, there was no "clearly established" law that national security wiretaps had to be in any way limited.

In the last chapter of *Zweibon* v. *Mitchell*, 720 F.2d 162 (D.C.Cir. 1983) *(Zweibon IV)*, summary judgment was entered in favor of John N. Mitchell in regard to wiretaps installed on the telephones of the Jewish Defense League in 1970 and 1971. The wiretaps had apparently been authorized to be installed without a warrant and against the advice of legal counsel to the Attorney General. The court of appeals in *Zweibon IV* concluded that as of the time of the authorizations "there existed no clearly established warrant or reasonableness requirement." *Zweibon IV*, 720 F.2d at 170. The court noted, however, that the Attorney General had himself imposed some limited "immunization procedures"; *i.e.*, federal criminal defendants and attorneys for criminal defendants were not to be monitored.

In *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1082 (D.C. Cir. 1981), a case involving Black Panther Party wiretaps at locations different from those involved in the present case, the court stated that "there was no judicially imposed reasonableness requirement for national security wiretaps at the time. . . ."

My final conclusion is that on the basis of the record, and consistent with *Zweibon IV* and *Sinclair* v. *Kleindienst*, of the District of Columbia Circuit, the former Attorney General of the United States, John N. Mitchell, is entitled to "qualified immunity," as defined in *Harlow* and *Davis* v. *Scherer*, in that he did not violate any clearly established constitutional or statutory rights of any of the plaintiffs, whose conversations were overheard by government agents who were conducting wiretap telephone surveillances without a warrant, as authorized by John N. Mitchell. Summary judgment will therefore be entered in favor of all defendants, against all the plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-826

KATHERINE W. BURKHART, ET AL.

v.

WILLIAM SAXBE, ET AL.

[Filed Aug. 23, 1984]

ORDER

Upon consideration of the cross motions for summary judgment filed by the plaintiffs and the defendants, together with the briefs of the parties, and upon the record in this case, for the reasons set forth in the accompanying opinion, it is

Ordered that plaintiffs' motion is denied and defendants' motion is granted; it is further

Ordered that judgment is entered in favor of the defendants, William Saxbe, Clarence Kelley, John N. Mitchell, John Doe and Richard Doe, and against the plaintiffs, Katherine W. Burkhart, Judith Chomsky, Eva Gold, Dina Portnoy, Candy Putter, and Joshua Markel.

BY THE COURT:

/S/ _____

AUGUST 1984